

154-f.
Thesaurus Juridicus:

CONTAINING

THE DECISIONS

OF

The several Courts of Equity,

UPON

THE SUITS THEREIN ADJUDGED,

AND OF THE

HIGH COURT OF PARLIAMENT,

UPON

PETITIONS AND APPEALS:

TO WHICH ARE ADDED,

The RESOLUTIONS of the BARONS of the EXCHEQUER
in Matters touching the REVENUES of the CROWN:

From the Period of the REVOLUTION to the End of
EASTER TERM 1798;

SYSTEMATICALLY DIGESTED,

By RICHARD WHALLEY BRIDGMAN, Esq.

VOL. I.

Æquitas est Correctio Legis generatim latæ quâ Parte deficit.

ARISTOT.

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4



TO THE
PROFESSORS
OF THE
LAWS OF ENGLAND.

THE Compiler has already advertised by his Proposals, that the leading feature of the present Work is a design to promote as well the attainment of legal knowledge, as to facilitate the pursuit of legal investigation, by contracting the reading of the Law into a narrower compass and method for ordinary study; an undertaking to which he was stimulated very early in his professional pursuits by the earnest recommendations of Sir *Matthew Hale*, Sir *Thomas Reeve*, Judge *Jenkins*, and many others. Those venerable and learned Sages had experienced the drudgery of turning over the disordered and ill-digested publications of their time, which were unintelligible to any but the most profound and elaborate reader, and they felt the loss of those valuable moments which were so frequently wasted in the tedious path of fruitless inquiry, being insensibly diverted from their object by Tables and other Repertories, which often give but a confused and dissatisfactory account of the subject sought for.

“ Nothing can conduce more to the honour of the Law
 “ and the repose of the Subject, than to make a great
 “ volume of Judgments collected out of the printed
 “ books, and from the records of the Courts at *West-*
 “ *minster* (a).”

With this view the Compiler has opened the Reporters at the period of our great and glorious Revolution; and confining himself in the first instance to the *Decisions in Equity*, he has abstracted the several Cases, and placed them under such heads or titles as a Professor would most naturally consult for information, and to which they particularly belong, so as to form a general and copious Index, exhibiting at one view the substance of the several

(a) *Jenkins's Rep. pref.*

Cases, and the judgments of the Courts thereon, omitting only the argumentative parts; for this Compilation is not intended as a Copy of the several Books of Reports, but as a Key or Guide to those Authors to whom we are indebted for handing down to us this portion of useful knowledge, and from whose writings fuller information may be obtained, whenever the subject of inquiry is sufficiently interesting to invite a more profound research into the *reasoning* of the matter.

Having digested the several Cases, and placed them under their respective titles, the Compiler's attention was in the next place paid to the *order of time* by which the progress of the Courts in the gradual administration of justice most regularly appears.

The Compiler is aware, that by preserving the order of time all the Cases upon the same points do not always immediately follow each other, yet as they are all comprehended under the same title, are so shortly stated, and for the most part are connected by references, the reader's attention (it is presumed) will not be so materially diverted from his object by the intervening Cases, as to render it essential to interfere with the progressive order of the adjudications.

The system of arrangement pursued in this Compilation is that which was recommended and adopted by the great *English* Philosopher Mr. *Locke*, which regards the *initial letter* of each title as the first object, and the *vowel* immediately following as the conductor to the point in question, (*ex gr.*) to search for *Abatement* see A—a, for *Bond* see B—o, for *Charity* see C—a, &c. &c. &c. In the margins are placed the names of the principal Cases, with those of the Authors by whom they are reported, (printed in *Italics* by way of distinction,) the periods of adjudication; the synonymous Cases, and such as are referred to, not in argument but for the most part in the determinations only; and especial care has been taken to notice particularly in their places all such Cases as have been questioned, doubted, denied, or controverted; but inasmuch as some determinations among the multitude (though not absolutely denied) may appear not consonant with the living law, the Compiler has pointed out the distinctions drawn by the most judicious and intelligent editors in their annotations.

The

The *Appendix* is so disposed as to be not only an index to the following sheets, but a *general Repertorium*. The cases are arranged in double order, both by the name of the plaintiff and defendant, unless where the King or his Attorney-General is plaintiff; and in such cases the defendant's name only is used. The Appendix will point out the names of *all* the Authors by whom each case is reported, the period of adjudication, and the title, section, and *placitum* under which it stands in this Compilation.

To most of the principal Cases the Compiler has annexed (in the margin) the names of *all* the Authors by whom they are respectively reported, for the convenience of those Gentlemen who may have only a partial collection of books, and may live at a distance from any public library; but as in some instances (among the references) he may have omitted to notice by whom Cases are reported, he begs leave to refer the reader to the Appendix, where he will find the information desired, if the Cases sought for have been reported at any time since the Revolution.

Although the Compiler only proposed to give such Cases as have been adjudged since the Revolution, he has in some instances introduced more than he at first undertook, particularly in the instance of the first volume of *Vernon's Reports*, in which almost all the Cases are anterior; but as those in the second volume are all subsequent, he thought it not advisable to take the reports of that author partially.

The arrangement of this particular department of the *Thesaurus Juridicus* (in which the latest editions of the several Reporters have been consulted, including the Abridgment of Cases in Equity since the Revolution) comprehends the determinations as well in the High Court of Parliament upon petitions and appeals, before the King in Council, in the Court of Delegates, and in the Duchy Chamber, as in Chancery and Exchequer; such Cases as have been adjudged in Parliament, and in the Exchequer-Chamber upon *writs of error*, are reserved for the department of the *Common Law*.

It was not the Compiler's original intention to have introduced into the Equity division of this Work such Cases as have been determined in the Court of Exchequer

touching the Revenues of the Crown, but to have reserved them also for the Common Law Division. Those Cases however are so intermixed by the Exchequer Reporters with the decisions on the Equity-side of the same Court, that he was induced to open a head of *Revenue*, for the reception of the several resolutions on that subject, with a hope at the same time materially to ease the Common Law department, which will unavoidably become very copious from the abundance of matter which it must necessarily embrace.

The Compiler now begs permission to offer the following sheets to the Professors of the Laws of *England*, as the first fruits of his own *individual* labour, humbly hoping that he may thereby assist the learned and studious reader in his inquiry, by a shorter and more easy mode of reference than has hitherto been attempted; and that by the same means he may introduce the Student to such an intimate acquaintance with the several Reporters, as will enable him more readily to attain a knowledge of those essential points, which many grave and learned men in successive ages have investigated and refined "into the very perfection of reason (a);" and "that he may become so well satisfied and so happy in the knowledge of truth, and in the wisdom of the Legislature, that he will not be liable to be imposed upon by fallacious opinions (b):" the natural offspring of fugitive and indigested doctrines.

The Compiler now respectfully takes his leave, most heartily devoting himself in the first place to the completion of the remaining volumes of the present Work, and in the next place to the revival of a second part of the *Thesaurus Juridicus*, containing the Decisions of the several Courts of *Common Law* arranged upon the same principle, and which he will submit to his learned Readers as soon as the nature of the subject will permit.

(a) Coke.

(b) Jenkins.

R. W. B.

LONDON,
20th June 1799.

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Bankers—Trade.

Barbadoes—Colonies.

Bargains, Catching—Heir, Fraud.

Bargain and Sale—Bankrupt, Deeds.

Barretry—Maintenance, Trade.

Barrister—Equity, Officers of.

Barons—Peers, Privilege of Parliament.

— of the *Exchequer*—Equity, Revenue.

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Brokers—Trade.

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Builders and Buildings, see Landlord and Tenant.

Burgeffes—Corporations, Parliamentary Representation.

B—y GENERAL REFERENCES from B—y, page 611.

Bye-Laws, see Corporations.

GLOSSARY

OF

ABBREVIATIONS AND REFERENCES USED IN THIS WORK.

Abf.	-	-	Absente, in the absence of.
Acc.	-	-	Accord, or agrees.
Adf. or atf.	-	-	Ad fectam, at the suit of.
Ambl.	-	-	Ambler's Reports.
And.	-	-	Anderfon's Reports.
Andr.	-	-	Andrew's Reports.
Anon.	-	-	Anonymous.
Anstr.	-	-	Anstruther's Reports.
Atk.	-	-	Atkins' Reports.
B. Com.	-	-	Blackstone's Commentaries.
Bac. Abr.	-	-	Bacon's Abridgment.
Bar. or B.	-	-	Baron.
Barn. or Barnard.	-	-	Barnardiston's Reports in Equity.
B. R.	-	-	Banco Regis, King's Bench.
Bridg.	-	-	Bridgman's Reports.
Bro. Ch. Ca. or Rep.	-	-	Brown's Cafes or Reports in Chancery.
Bro. P. C.	-	-	Brown's Cafes in Parliament.
Bulst.	-	-	Bulstrode's Reports.
Bull. N. P.	-	-	Buller's Nisi Prius.
Burr.	-	-	Burrow's Reports.
Burr. S. C.	-	-	Burrow's Settlement Cafes.
C.	-	-	Chancellor, Cafe, or Placitum.
C. B.	-	-	Commune Banco, Common Pleas.
C. Bar. or C. B.	-	-	Chief Baron.
C. J.	-	-	Chief Justice.
C. S.	-	-	Custos Sigilli, Lord Keeper.
Cam. Stell.	-	-	Camera Stellata, Star Chamber.
Cam. Scacc.	-	-	Camera Scaccarii, Exchequer-Chamber.
Cam. Duc.	-	-	Camera Ducata, Duchy Chamber.
Cart.	-	-	Carter's Reports.
Carth.	-	-	Carthew's Reports.
Caf. B. R.	-	-	Cafes temp. W. 3.—12 Mod.
Caf. L. Eq.	-	-	Cafes in Law and Equity.
Ca. temp. Talb.	-	-	Cafes in the time of Lord Talbot.
Ca. Parl. or P. C.	-	-	Cafes in Parliament.
Ch. Ca.	-	-	Cafes in Chancery.
Ch. Pre.	-	-	Precedents in Chancery.
Ch. Rep.	-	-	Reports in Chancery.
Clay.	-	-	Clayton's Reports.
Co. Ent.	-	-	Coke's Entries.
Co. Lit.	-	-	Coke on Littleton.

Com. and B. Com.	-	-	{ Comyns' Reports—Blackstone's Commentaries.
Com. Dig.	-	-	Comyns' Digest.
Comp.	-	-	Comberbach's Reports.
Cooke B. L.	-	-	Cooke's Bankrupt Laws.
Contr. or cont.	-	-	Contrà, against, or on the contrary.
Cor.	-	-	Coram, before.
Cro. 1—2—3.	-	-	Croke, temp. Eliz.—James—Charles.
Crompt.	-	-	Crompton.
D.	-	-	Digest—Dictum.
Dal.	-	-	Dalison's Reports.
D'An.	-	-	D'Anvers' Reports.
Dict.	-	-	Dictum, Dictionary.
Dig.	-	-	Digest.
Dom. Proc.	-	-	Domo Procerum—House of Lords.
Dub.	-	-	Dubitatur, doubted.
Ent. or Co. Ent.	-	-	Ld. Coke's Entries.
Eq. Abr.	-	-	Equity Cases abridged.
Farr.	-	-	Farrelley's Reports.
Fitz.	-	-	Fitzherbert.
Fitzg.	-	-	Fitzgibbons' Reports.
F. N. B.	-	-	Fitzherbert's Natura Brevium.
Forrest. or Forr.	-	-	Forrester's Cases temp. Talbot, C.
Fort. or Fortesc.	-	-	Fortescue's Reports.
Fonbl. Tr. Eq.	-	-	Fonblanque's Treatise in Equity.
Freem.	-	-	Freeman's Reports.
Gilb.	-	-	Gilbert's Reports.
Godb.	-	-	Godbolt's Reports.
Goldsb.	-	-	Goldsbrough's Reports.
H. or Hil.	-	-	Hilary Term.
Hardr.	-	-	Hardres' Reports.
Het.	-	-	Hetley's Reports.
Hob.	-	-	Hobart's Reports.
Hut.	-	-	Hutton's Reports.
Inft.	-	-	Ld Coke's Institutes.
J.	-	-	Justice.
Jenk.	-	-	Jenkins' 8 Centuries of Reports.
Jon. 1—2.	-	-	Jones W. or T. Reports.
Keb.	-	-	Keble's Reports.
Kel.	-	-	Kelynge's Reports.
K. C. R.	-	-	Reports temp. Ld. King.
Keil. or Kelw.	-	-	Keilwey's Reports.
La.	-	-	Lane's Reports.

GLOSSARY.

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Lat.	-	-	Latch's Reports—Latitat.
Leon.	-	-	Leonard's Reports.
Lev.	-	-	Levinz's Reports.
Lib. Aff.	-	-	Liber Affisarum, Book of Affize.
Lib. Reg.	-	-	Register Book.
Lit.	-	-	Littleton's Tenures.
Lut.	-	-	Lutwiche's Reports.
M. or Mich.	-	-	Michaelmas Term.
M. R.	-	-	Master of the Rolls.
Mar.	-	-	March's New Cafes.
Mitf. Ch. Pl.	-	-	Mitford's Chancery Pleadings.
Mod.	-	-	Modern Reports, or Cafes.
Mo.	-	-	More's Reports.
Mof.	-	-	Moseley's Reports.
N.	-	-	Note.
N. P.	-	-	Nifi Prius.
N. Benl.	-	-	New Benloe's Reports.
O. Benl.	-	-	Old Benloe's Reports.
Off. Br.	-	-	Officina Brevium.
Off. Ex.	-	-	Office of Executors.
Ord.	-	-	Ordinances—Orders.
Ow.	-	-	Owen's Reports.
Park.	-	-	Parker's Reports in Exchequer.
P. or Pasch.	-	-	Easter Term, Termino Paschæ.
Pl. or Pla.	-	-	Placitum.
Pl. C.	-	-	Placita Coronæ, Pleas of the Crown.
P. C.	-	-	Parliamentary Cafes.
P. W.	-	-	Peere Williams' Reports.
Pig.	-	-	Pigot.
Pl. Com. or Plow.	-	-	Plowden's Commentaries.
Pol.	-	-	Pollexfen's Reports.
Poph.	-	-	Popham's Reports.
Pow.	-	-	Powell.
Pr. Reg. Ch.	-	-	Practical Register in Chancery.
Pre. in Ch.	-	-	Precedents in Chancery.
Ref.	-	-	Resolved.
Raym. Ld. or Raym.	-	-	Ld. Raymond's Reports.
Raym. T.	-	-	Sir Thomas Raymond's Reports.
Reg. Brev.	-	-	Register of Writs.
Reg. Lib.	-	-	Register Book.
Rep. 1, 2. &c.	-	-	Coke's Reports, 1, 2. &c.
Rep. Eq.	-	-	Gilbert's Equity Reports.
Rol. Abr.	-	-	Rolle's Abridgments.
Roll.	-	-	Rolle's Reports.
Rot. or Roll.	-	-	Roll of the Term.

S. or

S. or Sect.	-	-	Section.
S. C.	-	-	Same Case.
S. P.	-	-	Same Point.
S. T.	-	-	Same Term.
Salk.	-	-	Salkeld's Reports.
Sav.	-	-	Saville's Reports.
Saund.	-	-	Saunders' Reports.
Scacc.	-	-	Scaccarii Curia, Court of Exchequer.
Sec.	-	-	Secus, otherwise.
Seld.	-	-	Selden.
Sel. Ca.	-	-	Select Cases.
Sel. Ca. in Ch.	-	-	Select Cases in Chancery.
Semb.	-	-	Semble, it seems.
Show.	-	-	Showers' Reports in King's Bench.
Show. P. C.	-	-	Showers' Cases in Parliament.
Sid.	-	-	Siderfin's Reports.
Skin.	-	-	Skinner's Reports.
Som.	-	-	Somers.
Spel.	-	-	Spelman.
St. or Stat.	-	-	Statute.
Stamf. Pl. or Prerog.	-	-	Stamford's Pleas, or Prerogative.
Stat. Glo.	-	-	Statute of Gloucester.
Stat. Westm.	-	-	Statute of Westminster.
Stat. Winch.	-	-	Statute of Winchester.
Stra. or Str.	-	-	Strange's Reports.
Sty.	-	-	Style's Reports.
St. Tri.	-	-	State Trials.
Swinb.	-	-	Swinburne.
T. or Trin.	-	-	Trinity Term.
Temp.	-	-	Tempore, in the time of.
Toth.	-	-	Tothill's Reports.
Tr. Eq.	-	-	Treatise of Equity.
Trem.	-	-	Tremayne's Pleas of the Crown.
V.	-	-	Versus, against.
V. or Vid.	-	-	Vide, see.
Vaugh.	-	-	Vaughan's Reports.
Vent.	-	-	Ventris' Reports.
Vern.	-	-	Vernon's Reports.
Vef. or Vez.	-	-	Vesey's Reports.
Vin. Abr. or Vin.	-	-	Viner's Abridgment.
Watf.	-	-	Watson.
Win.	-	-	Winch's Reports.
Yr. B.	-	-	Year-Book.
Yelv.	-	-	Yelverton's Reports.

THESAURUS JURIDICUS.

Abatement and Revivor.

A—a

§ 1. By what Events a Suit or Process is abated.

1. **T**HOUGH the plaintiff abated her own suit by marriage, yet she had the costs of the whole suit, deducting only the charge of the bill of revivor. P. 1685, cor. Guildford, C. S. *Durbaine v Knight*, 1 Vern. 318. 1 Eq. Abr. 126. pl. 7.

2. If the Attorney-General of the Dutchy Court exhibits an information in behalf of part-owners of coal mines, the relator's death abates the suit. T. 1690, Dut. Chamb. at Westminster, cor. Atkins, C. Bar. and Ventris, J. *Attorney-General of the Dutchy v. Sir John Heath & al. Proc. in Ch.* 13. 2 Eq. Abr. 1. c. 2. 70. c. 5.—*Vide* 3 Bac. Abr. 762. 2 Bulst. 114. And. 30. Note; By the Spiritual Law the death of the party never abates a suit. 2 Roll. Rep. 20.

Mr. Mitford says, the relator seems here to have sustained the character of plaintiff as well as relator. *Vide* Treat. on Ch. pl. 186.

3. Bill for a legacy against baron, and feme, who was executrix of the testator. Defendants answer and witnesses are examined, and after publication past the husband dies, the suit is not abated.—*Aliter*, had it been concerning the wife's inheritance. M. 1691, Canc. *Shelberry v. Briggs & Ux.* 2 Vern. 249. 1 Eq. Abr. 1. pl. 4. 65. pl. 6.

4. Bill against husband and wife for matters concerning the wife; they both answered, and then the husband died. The cause is abated, and plaintiff cannot proceed upon a bill of revivor, for the widow shall not be bound by her answer made *dum sub potestate viri*; but she may abide by it if she pleases, and then the plaintiff may proceed, and the decree shall bind her. H. 1697, Canc. *Anon.* 3 Salk. 84.

5. Information for a penalty abates by the death of the defendant after trial and before judgment; and this may be taken advantage of by suggestion of the death upon the roll, confessed by the Attorney-General, without a writ of error. H. 1698, in Scacc. *Attorney-General v. Buckley, Parker*, 264. *Vide* 1 Roll. 768. Cro. Car. 507. 3 Keb. 292. Hard. 161. 1 Sid. 131. 2 Sid. 34. 3 Leon. 215.

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B

6. Bill

M. 1719, cor. Parker, C.
Farwell v. Pratt,
 1 P. Wms. 593. 2 Eq. Abr. 1. pl. 3.
 2 Eq. Abr. 723. pl. 1. S. C. but
 not S. P.

M. 1727, Canc.
Finch & Lord Winchelsea,
 1 Eq. Abr. 2. pl. 7.
 1 P. Wms. 277. S. C. but not
 S. P.
 2 Eq. Abr. 257. c. 9.
 460. c. 11. S. C. but
 not S. P.

6. Bill by a bankrupt against his supposed debtor for an account. The assignees were not made parties. Good plea in abatement.

7. The legal estate in question in this case was vested in two of the defendants as trustees in fee, and the equitable interest in fee in another of the defendants, and the bill was brought by the plaintiff *F.* now Earl of *W.* and others, to supply the defective execution of an agreement made by Lord *W.*'s family, whereby the estate was to be settled on plaintiffs severally for life, remainder to their first and other sons successively in tail, and a decree was obtained accordingly; and it was referred to the Master to settle the conveyance, after which *cestui que trust* in fee died, notwithstanding which the Earl of *N.*, one of the plaintiffs, attended the Master, who reported that he approved the draft of a conveyance from the trustees in whom the legal estate was vested to the use of plaintiffs according to the decree: but plaintiff *F.* (who by a former settlement was to have been tenant in tail) took exceptions to the report, one of which was the abatement of the suit by the death of *cestui que trust*, and that the Master had no power to proceed till the suit was revived. But the court overruled the exception, and held that when there were several defendants the suit abated only as to them that died, but continued as to the rest, and therefore the defendants the trustees might well execute a conveyance of the legal estate; but if plaintiffs should desire a conveyance of the equitable interest, they must revive against the heirs of the *cestui que trust*. Held also, that where some of the plaintiffs refuse to join in a bill of revivor, the others may bring such bill, and make those who refused defendants. And it was agreed, that a defendant may bring a bill of revivor as well as a plaintiff; and it was likewise said, that it was every day's practice to order money out of court to the party entitled by the decree, notwithstanding the death of some of the parties.

T. 1731, cor. M. R.
Bligh & al. v. Earl of Darnley,
 2 P. Wms. 621. 2 Eq. Abr. 712.
 c. 7.

8. A sequestration for a contempt abates by the death of the party, which an extent does not.

Sic in *Morrice v. Bank of England*, Ca. Temp. Talb. 222. *Wareham v. Broughton*, 1 Ves. 182. but in *Hawkins v. Crook*, 3 Atk. 594. it is said though a sequestration on mesne process be determined by the death of the party, yet it is otherwise where it issues for non-performance of a decree. So in *Burdett v. Rockley*, 1 Vern. 58. though for a personal duty.

9. A commission being granted to examine witnesses at *Algiers*, the plaintiff died, by which in strictness the suit abated, but the witnesses were examined there before notice of the plaintiff's death. The examination held regular, though one of the witnesses was yet living.

T. 1733, cor. King, C.
Thompson's case, 3 P. Wms. 195.
2 Eq. Abr. 419. c. 12.
Vide *Crew & Vernon*, Cro.
Car. 97. *Burch & Maypowder*,
2 Vern. 400.

10. Plaintiff gave a feme covert a promissory note, and the husband dying before answer to a bill brought for discovery of the consideration, the suit was abated, for a feme covert can have no separate property.

P. 1739, cor. Hardw. C.
Leigbtourn v. Holyday,
2 Eq. Abr. 1. pl. 5.

11. Bankruptcy is no abatement.

M. 1748, cor. Hardw. C.
Anon. 1 Atk. 264.

Vide *post*, pl. 14, 15. et vide *Sellas v. Dawson*, cor. Lord Thurlow in 1790, contra.

12. Sequestration to compel performance of a decree abated by death of the plaintiff.

17 Dec. 1748, cor. Hardw. C.
Wharam v. Broughton,
1 Vef. 182.

S. C. Also the suit abates, a further act being necessary; so that a bill of revivor must be: no *subpœna sci. fa.* The decree was not signed and inrolled.

Vide *Bligh v. Lord Darnley*,
2 P. Wms. 619. *Colston v.*
Gardner, 2 Ch. Ca. 43. *Bland*
v. Witham. *Ld. Athol's case*.
Burdett v. Rockley. *Hide and*
another v. Greenhill. *Clerk v.*
Withers, 2 Ray. 1072.

S. C. *Fi. fa.* not abated by death of the plaintiff, the right being vested; otherwise of an extent, where a *liberate* is necessary. So of a sequestration, because a further act is necessary.

Vide 1 Lev. 282.
Cro. Car. 450.

13. A few creditors may sue for themselves and the rest, and the suit does not abate by the death of one.

19 June 1751, cor. M. R. abf. C.
Leigh v. Thomas,
2 Vef. 313.

14. Bankruptcy of the plaintiff does not abate a suit, and the bill may therefore be dismissed with costs for want of prosecution.

T. 1794, in *Scacc*
Davidson v. Butler,
2 Anstr. 460. (n.)
Vide *Bramhall v. Croft* in *Scacc*:
cor. Lord Thurlow, 1790, contra.

1789. *Waugh v. Austen*, 3 T. Rep. 437.—*Sellas v. Dawson*, cor. Lord Thurlow, 1790, contra.
2 Anstr. 458. (n.)

15. Bankruptcy of the defendant does not abate the suit, and the plaintiff cannot therefore dismiss his own bill without costs.

T. 1794, in *Scacc*.
Rutherford v. Miller,
2 Anstr. 458.

See more under *Bill of Revivor*, *Process*, *Sequestration*, *Writs*.

Sec. 2. Where Revivor is necessary, and in what Cases the same is directed or dispensed with by the Court.

M. 1685, cor. Jeffries, C.
Anon. 1 Vern. 351.

1. **I**N a bill of interpleader, if the trial at law is directed between the defendants, the cause is ended as to the plaintiff; and if he afterwards dies, the defendants may proceed without reviving.

M. 1690, cor. Lds. Commissioners,
Jackson v. Rawlins,
2 Vern. 195. 1 Eq. Abr. 3. pl. 10.
The book states the rule in equity to be, that where several are liable to a demand, all parties must be brought before the court.

2. A decree is obtained against a man and his wife, as administratrix of J. S. for 1500*l.*; the wife dies. The plaintiff can proceed against the husband without reviving against the administrator of the wife, but the husband is not bound to answer farther than the estate he had with his wife.

T. 1702, Canc.
Robinson v. Lord Wharton,
1 Eq. Abr. 285. pl. 6.

3. Lord *W.* had an injunction to quiet him in possession of mines, and upon hearing, an issue was directed to try if those mines were in plaintiff's or defendant's manor: the issue was found for plaintiff, who then died; and a bill of revivor was brought before the time for answering was out, or the cause revived. Plaintiffs moved for an injunction to stay Lord *W.*'s working the mines, for since the verdict against him he had trebled his number of workmen, and would quickly work out the mines. An injunction granted, though the cause was not revived.

H. 1725, in Scacc.
Lafco & al. v. Moyt, Bumb. 144.

4. One of the plaintiffs dies before the answer, the other proceeds without reviving. The court would not take the answer off the file, for unless all the matters in the bill survive, there must be a bill of revivor: if therefore the suit be abated, the defendant will have advantage of this at the hearing.

19 Mar. 1736, cor. Hardw. C.
Brown v. Higden, 1 Atk. 291.

5. It is a constant rule, that matters subsequent to the original bill must come by way of supplemental bill and revivor.

S. C. Though by the 8 *W.* 3. a suit shall not abate upon the death of one defendant, yet it must be taken with this restriction, that the subject-matter of the bill is not hurt thereby.

Aug. 1751, cor. Hardw. C.
Beard v. Earl of Powis,
2 Ves. 399.

6. A cause being abated by the marriage of one of the plaintiffs. Money may be ordered to be paid

paid out of court without revivor, upon consent of all parties interested.

7. Revivor for costs only where the plaintiff died after a decree, though before taxation and report, and where they were not to come out of a particular fund.

9 Feb. 1796, cor. Loughb. C. *Morgan v. Scudamore*, 3 Ves. j. 195. *Vide Lloyd v. Powis*, 19 June 1671, is the first case where the plaintiff died under such circumstances. — In *Ld. Dacres v. Tuite*, 1675, the decree being inrolled, and the costs recoverable out of the assets, held a bill of revivor will lie for costs only. — In *Temple v. Rowse*, 1679, demurrer to a bill of revivor for costs allowed, the decree not being inrolled. — In *Edgehill v. Brown*, 23 July 1732, the decree was not inrolled, but Lord King thought inrolment not necessary to constitute the demand by plaintiff's representative for costs taxed; the Master had made his report, and the revivor was held proper. — In *White v. Hayward*, Lord Hardwicke followed the same ground. — In *Blower v. Meyrick*, 1754, costs decreed out of the estate were held a lien upon it, though the party died to whom they were awarded. — *Price v. Humphreys*, 17 July 1766, is in point; revivor for costs only, plaintiff being dead. Demurrer that costs were not taxed, which Lord Camden over-ruled. — In *Ascoug v. Townsend*, cor. Bathurst, C. a perpetual injunction against defendant with costs. Demurrer to a bill of revivor upon plaintiff's death was allowed upon a recent authority in Scacc.; but *Ld. Thurlow* thought that case not fit to be followed.

See more under *Bill of Revivor*.

Sec. 3. Who may revive; against whom, and in what Manner.

1. IN case of abatement it is not necessary to revive against a defendant who has not answered.

H. 1684, cor. Guildford, C. S. *Oxburgh v. Fincham*, 1 Vern. 308. 1 Eq. Abr. 3. pl. 9.

2. A decree for confirming an agreement between the lord of a manor and his tenants, for settling heriots and stinting the common, revived by a bill brought by the purchaser of the manor, (who did not come in in privy,) and confirmed, though the lord and his tenants were only tenants for life.

H. 1686, cor. M. R. *Dunn v. Allen*, 1 Vern. 427. 1 Eq. Abr. 2. pl. 2. S. C. but not S. P. To this decision the reporter makes a quare.

3. Where a decree is for a mutual account, the defendant may revive as well as the plaintiff.

H. 1690, Canc. *Lord Stowell v. Cole*, 2 Vern. 219. 1 Eq. Abr. 3. pl. 5. *Vide post*, pl. 5.

4. An administrator obtains a decree and dies, the administrator *de bonis non* may revive this decree within the equity of the *stat. 30 Car. 2. c. 6*.

M. 1691, Canc. *Owen v. Curzon*, 2 Vern. 237. 1 Eq. Abr. 3. pl. 6.

5. Mortgagor brings a bill to redeem, an account is decreed, a report is made, and divers proceedings are had in the cause, and the plaintiff is ordered to pay costs and to deliver possession. The defendant the mortgagee dies. Whether the executor can revive the suit?

T. 1693, Canc. *Lady Stowell v. Cole*, 2 Vern. 296. 1 Eq. Abr. 3. pl. 5. *Vide Finch v. Lord Winchelsea*, 1 P. Wms. 277. *Vide supra*, pl. 3.

6. After a decree to account and abatement of the suit by defendant's death, his representative may revive as well as the plaintiff's.

P. 1702, cor. Wright, C. S. *Kent v. Kent*, *Price*, in Ch. 197. 2 Eq. Abr. 2. c. 3. *Vide 3 Ark. 691. Treat. on Ch. Pleadings*, 32. In account both parties are actors. *Hollinghead's case*, 1 P. Wms. 743. *Done's case*, 1 P. Wms. 263. S. P. *Thorn v. Pitt*, Sel. Ca. in Ch. 54. where this was said to be the rule.

T. 1702, Canc.
Pitt and the Creditors of the Duke of Richmond, 1 Eq. Abr. 3. pl. 7.

P. 1706, cor. Cowper, C. S.
Clare v. Wordell,
 2 Vern. 548. 1 Eq. Abr. 3. pl. 3.

H. 1734, cor. Jekyll, M. R.
Harris v. Pollard & al.
 3 P. Wms. 348. 2 Eq. Abr. 2. c. 4.
Vide Lasco and others v. Moy,
 Bunb. 144.

7. If a creditor is admitted by order to come in before a Master and prove his debt, and pay his contribution, he is entitled to revive if the cause abates.

8. A devisee may bring an original bill in nature of a bill of revivor, and shall have the same advantage of a decree as an heir or executor, and the defendant is not at liberty to make a new defence.

9. If the defendant's time for answering be out, the court will order proceedings to be revived; so, though the defendant by his answer insists that the plaintiff is not entitled to revive, for this ought to be shewn either by plea or demurrer: but if in such case it appears at the hearing that the plaintiff had no title to revive, he cannot have a decree.

See more under *Bill of Revivor, Costs, Plea*. For Abatement and Refunding of Legacies, Portions, &c., see *Average, Legacy, Proportion*.

A—a

Award.

Sec. 1. Of the Award generally.

T. 1687—8, cor. Jeffries, C.
Cresley v. Carrington,
 1 Vern. 469. 2 Vern. 79. 1 Eq.
 Abr. 51. pl. 2.
Vide post, f. 10, 13, 14, 15.

M. 1689, cor. Lds. Commissioners,
Hide v. Coote, 2 Vern. 109.
 1 Eq. Abr. 51. pl. 3.
Vide Vinyor's case, 8 Co. 82.
Hide v. Petit, 1 Ch. Ca. 185.

16 April 1702, Dom. Proc.
Hamilton & an. v. Stephenson
 & Ux. Coll. P. C. 209.

1. AN award made pursuant to an order of court must be confirmed, as in the case of a Master's report; and either side has liberty to except to it, and when so confirmed, the cause may be set down for hearing upon the award.

2. Submission to a reference, and the award to be confirmed by decree of the court without appeal or exception, yet exceptions to the award allowed, *Vide post*, f. 10, 13, 14, 15.

3. One party exhibits a bill to be decreed to a matter about which an award had been made without taking notice of the award, and the other party insists on the award, and then the first party files a supplemental bill, stating and objecting to the award; and the other party exhibits a bill to carry the award into execution. The court decreed upon the matter of right originally insisted upon, and left the matter of the award open to

each party to take his legal remedy; but the Lords reversed the decree, and sent back the cause, that both causes might be heard upon the whole matter.

4. An award is made a rule of court according to a submission for that purpose, and an attachment is taken out for not obeying the award, and then the party dies against whom the attachment issues. The act of parliament * directing awards to be carried on by attachment as in other cases of contempt, the attachment is gone, and the remedy is lost. *So held* by all the judges.

M. 1703, Canc.
Webster v. Bishop,
2 Vern. 444. 1 Eq. Abr. 51.
c. 1. 2 Eq. Abr. 93. c. 6.
Pres. in Ch. 223.
* 9 & 10 W. 3. c. 15.

5. A mother tenant for life of a house, remainder to her six daughters in fee, the mother and J. S. submit to an award, touching the title to this house; whereupon the arbitrators award, that the mother should procure the daughters to join in a conveyance thereof: the daughters are married, and one of them dies, leaving an infant heir. J. S. brings a bill against the mother and daughters and their husbands, and the daughters being examined in a former cause say, they are willing to convey; they are not bound touching any title to the freehold and inheritance.

H. 1727, cor. King, C.
Evans v. Cogan,
2 P. Wms. 450.

6. Bill to set aside an award. Defendants pleaded the award, and that the submission was made a rule of the court of B. R., and that there had been no application to that court pursuant to stat. 9 & 10 W. 3., and that therefore all courts were concluded: objected that defendants ought not to plead the award. *Per cur.* The plea should stand for an answer, with liberty to except (*int. al.*) as to the express charges of undue practice in the umpire.

6 May 1729, in Scacc.
Alarides and others v. Campbell,
Bunb. 265.
Vide Reynolds v. Perrott in Scacc.
4 May 1727.

7. A bill lies to compel a specific performance of an award to convey an estate where the party submitting has received the money, in consideration of which he is to convey the estate sued for.

T. 1713, cor. Yekyll, M. R.
Hall v. Hardy,
3 P. Wms. 187. 190.
2 Eq. Abr. 28. pl. 35.

S. C. Difference between awards to pay money, and to do any thing collateral, and why a bill in equity may be proper only to compel a performance of the latter.

8. The court of B. R. was the proper court to examine into the partiality of the arbitrators, as the award was made a rule of court there, which the plaintiff might have done by shewing cause why

16 Mar. 1740, cor. Hardw. C.
Kampfbire v. Young, 2 Atk. 155.

the rule for an attachment on the non-performance of the award should not be made absolute.

1741, cor. Hardw. C.
Gibson v. Smith,
 2 *Eg. Abr.* 93. pl. 7. MS. case.
 2 *Atk.* 182. S. C. but not S. P.

9. Where *arbitrators* direct that an application shall be made to parliament to confirm their award, such award is not binding unless an act of parliament be applied for and obtained pursuant to such direction.

T. 1790, cor. Thurlow, C.
Rice v. Williams, 3 *Bro. Ch. Ca.* 163.

10. Exceptions do not lie to an award.

M. 1790, cor. Thurlow, C.
Burton v. Ellington,
 3 *Bro. Ch. Ca.* 196.

11. Award and release pleaded to a bill to open an account, the plea ordered to stand for an answer.

T. 1791, cor. Thurlow, C.
Knox v. Simmonds,
 3 *Bro. Ch. Ca.* 158. 1 *Vef. jun.* 369.
Vide Milligan & Dick.
Perkyns v. Okeins.

12. The time for making an award was *on or before the first day of Michaelmas* term, it was afterwards enlarged *till the first day of Hilary* term. An award made *on the first day of Hilary* term is good.

S. C. Where there is non-performance the proper motion is, that the party stand committed, and the service must be personal.

M. 1792, cor. Lds. Commissioners,
Dick v. Milligan,
 4 *Bro. Ch. Rep.* 117.

13. Exceptions will lie to an award; but they must be to matters on the face of it, and not to matters of fact, of which the arbitrators are the proper judges.

1 *Vef. jun.* 370. (n.)
 Mar. 1792, cor. Thurlow, C.
Milligan v. Dick, cited in *Knox v. Symmonds*.

14. Exceptions may, with leave of the court, be taken to an award upon reference to inquire into facts; if allowed, the court will refer it to a Master, but not back to the arbitrator without consent.

1 May 1793, cor. Loughb. C.
Mitchell v. Harris, 2 *Vef. jun.* 136.
Vide Halfhide v. Fenning, 2 *Bro. Ch. Ca.* 336.

15. Award pleaded would be examined in a court of law as well as equity.

H. 1794, cor. C.
S. C. rebeard, 4 *Bro. Ch. Ca.* 536.

S. C. But these exceptions upon a rehearing over-ruled, the order being, that the award should be final.

M. 1793, in Seacc.
Hutchison v. Hodgson,
 2 *Anst.* 361.

16. All matters in difference in law and equity being referred to arbitration, and made a rule of court in *K. B.*, the award directed that all suits between the parties should be discontinued; the defendant in equity thereupon moved that the bill might be dismissed. This was refused, for the court cannot act on the award.

H. 1795, in Seacc.
Routh v. Peach, 2 *Anst.* 519.

17. The bill stated an award between the parties, and that it had not provided for a particular event by

by which the plaintiff was damnified, viz. by the partnership fund proving deficient, and the plaintiff being compelled to make up the deficiency. Plea, the award. The court thought the award should be considered as final, unless specific payments by the plaintiff to creditors had been stated, and allowed the plea.

Sec. 2. Of the Submission; the Parties thereto, and the Matters submitted.

IF *A.* and *B.*, executors of *J. S.*, of the one part, and *C.* his widow of the other part, submit to arbitration, the arbitrators may make an award, not only of matters of difference between *A.* and *B.* jointly, or *D.* and *B.* separately, and *C.*, but also of matters between *A.* and *B.*, provided they have knowledge of the whole fact, and all the parties interested are before them.

M. 1684, cor. North, C. S.
and Levinz, J.
Carter v. Carter, 1 Vern. 259.
1 Eq. Abr. 49. pl. 2.

2. Submission to an award, so as the arbitrators make their award at or upon the 27th March then next, and if they make no award then, if the umpire make his umpirage on the same day. The umpire cannot make his umpirage on the 27th of March, the arbitrators having all that day to make their award.

P. 1689, Canc.
Ann. 2 Vern. 100.

3. If a submission to an award is conditional, *ita quod* the award is made *de premissis*, and the award is not made of the whole, it is void. But if the submission is not conditional, then the award, though made but of part of the premises submitted, is good *pro tanto*. Per Lord Maynard.

M. 1689, cor. Lds. Commissioners,
Hide v. Cooth, 2 Vern. 109.
1 Eq. Abr. 51. pl. 3.
Vide Vinyor's case, 8 Co. 32.
Hide v. Petit, 1 Ch. Ca. 185.
touching the countermand of a
submission to an award.

4. When submission to an award is by bond, which is afterwards made a rule of court, the court will allow the same objection to the award as they would do when the same came before them in an action on the bond, otherwise there might be a contradiction; but when a submission is only by rule of court, the court will not receive objections to it, for it is the same as if the whole had been in the rule; and the court will not relieve when the matter has been examined by another court that had jurisdiction, unless the equity be that some matter of fraud in the award had come to the knowledge of the party since the former examination, which did not appear before the other court. Per Lord Chancellor, who (as Mr. Viner says) had taken formerly the same distinction in *B. R.*

P. 1720, cor. Parker, C.
Coxeter v. Anderson,
2 Eq. Abr. 92. pl. 2.
3 Vin. Abr. 134. pl. 19.

M. 1734, Cane.

Potter v. Davy,

2 Eq. Abr. 75. pl. 35.

3 Vin. Abr. 135. pl. 6. (n.)

Viner makes a *quære*, if the money had been equal to or exceeded the penalty of the bond, whether then the plaintiff is not entitled to any relief?

T. 1735, cor. Talbot, C.

Spettigue v. Carpenter,

3 P. Wms. 361.

2 Eq. Abr. 93. c. 5.

Vide Keen v. Godwin,

Bunb. 250.

P. 1738, cor. Hardw. C.

Thompson v. Noel & al.

1 Ark. 60. 1, 2.

5. Bill to set aside an award, and to be relieved against an action at law on the bond of submission. The defendant pleaded as to so much of the bill as sought to set aside the award, and staying the defendant's proceedings at law; and he set forth the submission and award to be fairly made, &c. But the plea was over-ruled, because it covered too much; for the plaintiff in all events is entitled to relief against the penalty of the bond, though the merits are with the defendant.

6. After an award made, it is too late to confirm a submission so as to make it good within the act of 9 & 10 W. 3. c. 15.

S. C. A party submitting to an award desired the arbitrator to defer making his award until he should satisfy him as to some things which the arbitrator took to be against him. Though this was within two or three days before the time for making the award was out, yet, the request not being complied with, the award was held ill.

7. A., by articles previous to his marriage, agrees to vest 1000*l.* in trustees, the interest thereof to be received by A. and his wife during their lives, and afterwards to be divided between their issue; and gives the trustees a warrant of attorney to confess a judgment for that sum, which was entered up. A. enters into partnership with B. afterwards, and being indebted to the partnership estate in more than his interest in that estate, they submit the difference between them to arbitration, and part of the stock in trade is awarded to be lodged in the hands of a third person, any part to be delivered to either of the parties on making it appear any bond, or other debt due from the partnership, had been paid by either; the quantity to be delivered in proportion to the money paid. The trustees in the marriage articles bring a *scire facias* on the judgment confessed to them, and take a moiety of the deposited stock in execution as the property of A. Bill by the partnership creditors to set aside the execution, and to have the moiety of the stock so seized appropriated to payment of their debts, insisting it was specifically bound by the award and the execution of it, the plaintiffs being no parties to the submission, nor privy at all to the transaction, nor under any obligation of abiding by the award, ought not to have the benefit of it; and therefore bill dismissed.

S. C.

§ 2. *Of the Submission, &c.*

A—II

S. C. A bill will not lie to carry an award into execution, where the parties to the submission do not acquiesce in it, nor agree afterwards to have it executed; but must be enforced at law.

8. Where the parties have agreed to make the submission to an award a rule of court, and to be restrained from bringing a bill in equity, the arbitrators, notwithstanding the award may be defective in point of law, may plead it in bar to a bill in equity.

6 Aug. 1742, cor. Hardw. C.
Lingood v. Croucher,
2 Atk. 395.

S. C. Where a submission to an award has been made a rule of court, it is a contempt of that court to dispute the order, unless they can shew partiality, corruption, or misbehaviour in the arbitrators.

Vide E. India Company v. Sandya,
1 Vern. 127.

9. Where there is a general submission of all matters in difference between two parties to arbitration, and the award directs particular securities to be delivered up by one of them, without taking any notice of two bonds, or ordering mutual releases to be executed: yet it shall be presumed, that these bonds were under the consideration of the arbitrators at the time of making their award; and if they are afterwards put in suit, the plaintiff shall pay the costs of such proceedings.

5 Feb. 1770, Dom. Proc.
Crofton, Bart. v. Conner,
6 Bro. P. C. 409.

10. Parties to an award are bound by it:

7 July 1791, cor. Thurlow, C.
Price v. Williams, 1 Ves. jun. 365.

11. Accounts referred to the Master: afterwards an order of reference was made to arbitrators to take an account of all dealings and transactions in like manner as if the same were referred to the Master, and that the parties should be concluded and bound by the award, and should observe it; and farther directions were reserved. This reference is not in nature of a reference to the Master; therefore the parties are bound by a general award of a balance due without particulars stated: the decision being final, because upon matter of fact, and no corruption or misconduct imputed; and the court will not require particulars merely as a ground for costs.

24 Nov. 1792, cor. Lda. Commissioners,
Dick v. Milligan, et contra.
2 Ves. jun. 23.

S. C. Parties may, if they choose, take arbitrators instead of the Master; and then they must proceed as the Master, and make the same report.

S. C. By reference to arbitration, both at law and in equity, the court divests itself of all judgments upon the facts,

Vide Morgan v. Mather,
2 Ves. jun. 22.

Sec. 3. Of the Arbitrators and Umpire; their Power and Duty.

P. 1689, Canc.
Anon. 2 Vern. 100.

1. **S**ubmission to an award, so as the arbitrators make their award at or upon the 27th *March* then next, and if they make no award, then if the umpire make his umpirage on the same day. The umpire cannot make his umpirage on the 27th of *March*, the arbitrators having all that day to make their award.

T. 1700, Canc.
Dr. Steward v. E. India Co.
2 Vern. 380.
1 *Eq. Abr.* 40. pl. 8. S. C.
73. pl. 14. S. C.
Vide Newman v. Godfrey,
2 Bro. Ch. Ca. 332.

2. A bill is brought to be relieved against an award, and the arbitrators being made defendants; they demurred to the whole bill, because the plaintiff could have no decree against them, and the plaintiff might examine them as witnesses. Demurrer allowed without putting them to answer to matters of fraud.

6 Aug. 1742, cor. Hardw. C.
Lingood v. Croucher,
2 Atk. 395.

3. Where the parties have agreed to make the submission to an award a rule of court, and to be restrained from bringing a bill in equity, the arbitrators, notwithstanding the award may be defective in point of law, may plead it in bar to a bill here.

Vide John Ward's case.

S. C. Arbitrators may plead the award in bar to a bill charging partiality; but they must support their plea by shewing themselves impartial, or the court will give a party a remedy by making *them* pay costs.

Vide East India Company v.
Sandys, 1 Vern. 127.

S. C. Where a submission to an award has been made a rule of court, it is a contempt of that court to dispute the order, unless they can shew partiality, corruption, or misbehaviour in the arbitrators.

13 May 1743, cor. Hardw. C.
Willington v. Mackintosh,
2 Atk. 569.

4. One partner brings a bill against another to discover and be relieved against frauds, &c. The defendant pleaded an agreement, that in case any difference should arise between them, it was to be referred; and the matters in the plaintiff's bill relate only to the partnership, and yet have never been submitted to arbitration, nor has he ever proposed a reference, though the defendant offered, and was always ready to do it. *Lord Hardwicke disallowed the plea; for as it is a bill to discover and be relieved against frauds, the arbitrators cannot examine on oath, which, by the agreement, they should have had the power of doing.*

5. Arbi-

§ 3. Arbitrators' Power and Duty.

A—a 13

5. Arbitrators are not bound to give notice of the time they intend to meet, or the particular place where.

1 July 1747, cor. Hardw. C.
Titterton v. Peat,
3 Atk. 530.

6. To a bill brought against an arbitrator, seeking a discovery of the grounds on which he made his award, he pleaded in bar that he was not obliged to set them forth. Lord *Hardwicke* thought it unreasonable he should be put to so much trouble and expence, and allowed the plea.

30 July 1748, cor. Hardw. C.
Anon. 3 Atk. 644.

8. C. If there be a palpable mistake or miscalculation, the party aggrieved may bring his bill against the party, in whose favour the award is made, to have it rectified, and not against the arbitrator.

7. If one arbitrator makes an improper declaration, he will render himself liable to costs, and satisfaction will be decreed on the judgment on the bond of submission; but the fact must be put in issue, or opportunity given to answer it.

21 June 1751, cor. Hardw. C.
Chicot v. Lequesne,
2 Vesf. 315.
Vide *Ward v. Periam*,
Lib. Reg. B. 1720. fo. 217.

8. Arbitrator is not to consider himself agent for the person who appoints him.

T. 1790, cor. Thurlow, C.
Calcraft v. Rosbuck,
1 Vesf. jun. 226.

9. Arbitrator, on general reference of all matters, &c. may go farther than the court could to do complete justice, and may therefore relieve against a harsh right, which, in a court of justice, would prevail. A party may impeach the award for corruption or gross mistake, not for erroneous judgment; in case of mistake the arbitrator must be convinced of it, and that he acted upon it. But arbitrator, on reference to inquire into facts, &c. is as a Master, and the court will draw the conclusion; or if he has, will see that it is right.

T. 1791, cor. Thurlow, C.
Knox v. Symmonds,
3 Bro. Ch. Ca. 358.
1 Vesf. jun. 369.
Vide *Milligan v. Dick*,
Perkins v. Okeins.

10. Award contrary to law may be impeached, for that is excess of power.

21 Nov. 1792, cor. Lds. Commissioners,
Morgan v. Matber, 2 Vesf. jun. 15.

11. Arbitrator combining shall pay costs.

Lord Lonsdale v. Littledale, 2 Vesf. jun. 451. Vide *Chicot v. Lequesne*, 2 Vesf. 315. and *Ward v. Periam*, there cited.

2 Aug. 1794, cor. Loughb. C.
2 Vesf. 315. and *Ward v. Periam*,

Sec. 4. For what Causes an Award may be set aside, and where it shall stand.

1. **A**N award that tenant for life should pay to the remainder-man 370*l.* for waste, supposed to be done, which was near the value of his estate for life, and no corruption being proved, the award

P. 1683, cor. North, C. S.
Brown v. Brown,
1 Vern. 157, 158.
1 Eq. Abr. 50. pl. 4. 225. pl. 10.
2 Ch. Rep. 140.

Note; In this case the umpire himself, though objected to, was read as a witness.

award stood, notwithstanding the party had made good the repairs within 40%. before the award made.

S. C. Where there appears a manifest error in the body of an award, in some cases there may be relief against it in equity; but where the error does not appear without unravelling of it, and examining to matters of account, it is not relievable.

H. 1691, Canc.
Earle v. Storker,
2 Vern. 251.
1 Eq. Abr. 50. pl. 5.

2. An award set aside, it appearing the arbitrators were interested in the cargo, touching which the award was made, and therefore put too great a value thereon; and in five days after the award was made, the money awarded was attached by the arbitrators for debts owing to them.

Vide Smith v. Coryton.
Pitt v. Dawkra.

S. C. Arbitrators promise to hear witnesses, but make their award without doing so. Award set aside.

28 Jan. 1702, Dom. Proc.
Parker v. Burroughs & an.
Colles' P. C. 257.
N. B. The reporter's statement of this case mentions several curious anecdotes of the opinions of the famous Dr. Titus Oates.

3. An award made by an arbitrator, who had been convicted of perjury, decreed void, and because it appeared to be made partially and maliciously.

H. 1704, cor. M. R.
Harris v. Mitchell,
2 Vern. 485.

4. Arbitrators, if they could not agree, were to choose an umpire. They making no award, and not agreeing about the person to be umpire, they throw *cross and pyle* who should choose him. The umpire made his award, and it was set aside by reason of his being chosen in that manner.

M. 1705, cor. M. R.
Burton v. Knight,
2 Vern. 514, 515.
Decree at the Rolls confirmed by
Cowper, C. S.

5. The submission is to three, or any two of them. After all the arbitrators had several meetings, and heard the parties, two of them make an award privately without notice to the other arbitrator. Award set aside.

S. C. If a submission is to three, or any two of them, and two by fraud or force exclude the other, *that* alone is sufficient to vitiate the award.

S. C. Private meetings of the arbitrators with one of the parties, and admitting him to be heard to induce an alteration in the intended award, is partiality. If arbitrators go upon a plain mistake, either as to law or fact, equity will relieve against the award.

1 July 1713, Dom. Proc.
Jones v. Bennett & an. Executors,
1 Bro. P. C. 411.

6. After a submission of *all matters in difference*, and an award made by an umpire, a release given, and an acquiescence of nine years, the award shall not be set aside, or the matters unravelled,

ravelled, upon a suggestion, that the umpire had particular matters only under his consideration.

7. Bill was for an account and to impeach an award between plaintiff and defendant *B.* touching a partnership in buying and selling diamonds in France in 1719, and the bill was against the arbitrators as well as the parties. Defendant *B.* (the party as to the account, &c.) pleads the award, &c. and the arbitrators, as to a discovery of several particulars, and as to any relief against them, plead the submission, and that by consent it was made an order of this court, &c. Lord Chancellor allowed *B.*'s plea to the account, &c. but over-ruled the arbitrators' plea, as covering too much, i. e. several particulars, which might tend to shew a partiality, &c. in their proceedings.

8. Bill to set aside an award made pursuant to a rule of court in *B. R.* for misbehaviour in the arbitrators. Plaintiff and defendant entered into an arbitration-bond, and submitted to make it a rule of court, and an award was made pursuant to a submission by rule of court; but the plaintiff not liking the award applied to the court of *B. R.* to set it aside, and made several objections to it: and the court being divided in opinion, a rule was made to hear counsel why the award should not be set aside, and afterwards the rule was discharged; but the court being divided, the plaintiff could not obtain a rule for an attachment for non-performance of the award, and therefore brought an action upon the arbitration-bond, and got judgment; and then *Ward*, the defendant at law, brought his bill to be relieved against the award. The question was, whether the plaintiff at law, not having pursued the method prescribed by stat. 9 W. 3. c. 15. by attachment, but having brought an action upon the arbitration-bond at law, and not having pleaded the statute to the jurisdiction of this court, the court may not proceed to examine the award, &c.—The defendant's counsel insisted, that the award being made by rule of court pursuant to the statute, and set out to be so made by defendant's answer, he ought to have the benefit of the statute as well as if he had pleaded it, and the parties to the award have no remedy but by application to the court where the rule was made; that this statute was pleaded to the jurisdiction of this court *tempore Cowper, C.*, and the plea was allowed. Ordered, that the

Master

1718, cor. *Cowper, C.*

Godfrey v. Boucher,

2 *Eq. Abr.* 92. pl. 4.

3 *Vin. Abr.* 139. pl. 38.

In this case the *Ld. Chancellor* thought that the two terms given by the stat. 9 & 10 W. 3. c. 15. s. 2. for complaints against undue awards, concluded all courts and all manner of equity.

In *Alarides v. Campbell*, in *Scacc.* the opinion of the Chief Baron was, that courts of equity are not confined to allow of exceptions to awards within the time prescribed by stat. W. 3. c. 15. as courts of law are. *Bar. Hale & Comyn* accord. but *Cartw. B.* differed. *Vide Bunb.* 265.

P. 1720, *Canc.*

Ward v. Periam & al.

2 *Eq. Abr.* 91. pl. 1.

Master should make a state of the case for the resolution of the court.

M. 1724, Canc.
Waller v. King, 9 Mod. 63.
 2 Eg. Abr. 92. c. 3.
Vide 1 Roll. Rep. 380. Ch.
 Ca. 270. *Brown v. Brown*, 2 Ch. Ca. 140. 1 Vern. 157. 259. 1 Ch. Rep. 141. 2 Com. Dig.
 tit. Chancery (2 K. 6), Kyd on Awards, 236.

9. An award, though made without hearing one of the parties, not set aside, because he had notice, and might have been heard if he pleased.

14 May 1728, in Scacc.
Keen v. Godwin,
 Bunb. 250.

10. An award of releases to the day of the date of the award is good.

15 Mar. 1734, cor. Talb. C.
South-Sea Company v. Bumstead,
 2 Eg. Abr. 80. pl. 8.
 3 Vin. Abr. 140. pl. 39.
 Mol. 77. S. C. but not S. P.
 Lord Talbot in this case said,
 that the rule that awards cannot
 be set aside unless for partiality
 or corruption is too narrow; for

11. If an account stated, and releases are pleaded to a bill to set aside an award and to have an account, and defendant swears the accounts taken by the arbitrators were true accounts, but does not answer particular concealments and frauds alledged in the bill, the plea is bad.

if there be fraud to mislead the arbitrators, that is a reason.

T. 1735, cor. Talb. C.
Spettigue v. Carpenter,
 3 P. Wms. 361.
 2 Eg. Abr. 93. pl. 5.
Vide *Keen v. Godwin*,
 Bunb. 250.

12. A party submitting to an award desired the arbitrator to defer making his award until he should satisfy him as to some things which the arbitrator took to be against him. Though this was within two or three days before the time for making the award was out, yet, the request not being complied with, the award was held ill.

18 June 1737, cor. Hardw. C.
 on Appeal from the Rolls.
Medcalfs, Widow, & al. v.
Medcalfs & al.
 1 Atk. 63, 4.

13. A. and his wife covenant in articles before marriage in consideration of 2000*l.*, his wife's portion, to release all the right that might accrue to them out of her father's personal estate by the custom of London.—The husband is bound by this covenant; and though the wife was under age, yet it is a matter that accrues to him in the right of his wife, and he may release it, and his release will bind her; and an award to the contrary set aside.

Vide 1 Vern. 6. 2 Vern. 665,
 666.
 1 P. Wms. 644, 645.
 2 P. Wms. 527.

S. C. The husband's covenanting to release, is an extinguishment of the wife's right to the orphanage part; and if so, leaves the estate of the father as if it had never been charged, and therefore must be considered as part of his general personal estate, and not go wholly to the father's executor as a part of the dead man's share.

S. C. Where arbitrators are deceived, or where they make their award clandestinely, without hearing each party, a court of justice will interpose and avoid such award.

S. C. Though a bill in Chancery cannot be received in evidence at law, yet in this court it may be read, and has been often allowed as evidence.

14. A

14. A plea was put in to a bill brought to set aside an award and for a general account. Lord *Hardwicke* allowed it as against the general account, but held that the plaintiff was not precluded at the hearing from objecting to the award for fraud or partiality in the arbitrators.

It is improper to come into this court to set an award aside merely for an objection in point of form.

Courts of law formerly used too much nicety in determining awards.

Though arbitrators refer costs to be taxed, yet such reference will not vitiate the award at law.

If courts of equity were to take greater latitude in determining awards than courts of law, it would introduce confusion and uncertainty, and therefore it is better for them to adhere to one rule.

As courts of law have said they will never make a presumption to overturn an award, so neither will a court of equity.

Where an award is good to a common intent, and answers the purpose of parties in submitting to a reference, the court will not set it aside upon trivial objections.

If arbitrators delegate their power, the award is totally void.

It is not necessary for arbitrators to chalk out particularly the method in which the award is to be carried into execution.

Where arbitrators have awarded releases, the leaving it to the court to give directions to a master to settle the form does not vitiate an award.

15. If arbitrators are mistaken in a plain point of law, it is a ground rule to set aside the award, but otherwise if it had been a doubtful one.

16. An award being made by judges of the parties own choosing is final, unless there is collusion or gross misconduct in the arbitrators.

S. C. A defendant is not obliged to set out the account between him and the plaintiff after an award in his favour relating to that account; for a plea of an award is good, not only to the merits but to the discovery.

17. One cannot move to set aside an award without its being made a rule of court.

18. Bills to set aside an award; the court will not let the party go into any legal objection except for partiality and corruption; but if the bill is for

15 Jan. 1742, cor. *Hardw. C.*
Lingood v. Eade,
2 *Atk.* 501 to 506.

9 May 1747, cor. *Hardw. C.*
Ridout v. Pain, 3 *Atk.* 494.
Vide Cornforth v. Geer,
2 *Vern.* 705.
Metcalf v. Ives, 1 *Atk.* 63.

1 July 1747, cor. *Hardw. C.*
Tutten v. Peat, 3 *Atk.* 539.

21 June 1751, cor. *Hardw. C.*
Chicot v. Lequesne, 2 *Ves.* 317.

27 Nov. 1754, cor. *Clarke, M.R.*
Champion v. Wanbon,
Ambl. 245. 1 *Eq. Ab.* 51.

an account, and prays to set aside an award in order to let in such account, there the plaintiff may make legal objections.

S. C. Mistake admitted in an award, which turned the balance the other way, yet the award was not set aside *in toto*.

S. C. The arbitrators promised to hear witnesses, but making the award before they had so done, the award set aside.

Cited in *Earle v. Stocker*,
2 Vern. 251. H. 1691.

21 Nov. 1792, cor. Lds. Com-
missioners,
Morgan v. Matber, 2 Ves. jun. 15.

Motion before Lord Loughbo-
rough to set aside the award in
nature of a rehearing denied.
9 March 1793.

24 Nov. 1792, cor. Lds. Com-
missioners,
Dick v. Millegan, et contra.
2 Ves. jun. 24.

2 Aug. 1794, cor. Loughb. C.
Lord Lonsdale v. Littledale,
2 Ves. jun. 451.

Vide Lucas v. Wilson,
2 Burr. 701.

19. Award upon a general reference cannot be impeached for erroneous judgment upon facts; but may for corruption, misbehaviour, excess of power, and mistake admitted by the arbitrators, in the three first cases there must be satisfactory evidence against them; for the court favours awards.

S. C. An award not to be impeached for allowing compound interest; it may be allowed in case of a contract; for it is either express or to be inferred from the nature of the dealings between the parties; as if it is according to the course of their trade; therefore it is a conclusion of fact on which the judgment of the arbitrators is final: but this doctrine as to interest has no relation to mortgages,

20. Matter of exception to an award must be confined to what arises upon the face of it compared with the proceedings in the cause, and cannot be introduced by affidavit: any thing *dehors* charging misconduct, &c. must come upon motion to set it aside, and there cannot be a partial inquiry.

21. Bill lies to set aside (for fraud) an award made a rule of a court of law under 9 & 10 Will. 3. c. 15.

S. C. An award in a cause depending is not within the statute.

S. C. Upon an award made a rule of a court of law, one of the terms being, that no bill in equity shall be filed, the court of law has a discretion to enforce that term or not.

See more under *Account, Bill, Equity, Process, Trade*.

GENERAL REFERENCES,

Ambassador—see *Privilege*.

Attachment—*Process*.

Advancement—*Distribution*,

London, Customs of,

Attainder—*Treason*,

Abeyance.

A—C

1. **WHERE** the remainder is devised in contingency, the reversion in fee is not in abeyance, but descends to the heir.

M. 1718, cor. Parker, C.
on Appeal from the Rolls,
Cartar v. Barnadiston,
1 P. Wms. 516.

Vide Fearn's Cont. Rem. 275.

Note: A distinction is here made between a remainder created by conveyance and one arising by will. The editor says, *Quere tamen*, upon what foundation this distinction depends, since there does not appear to be any such difference taken in *Plunkett v. Holmes*, 1 Lev. 21. and *Purfoy v. Rogers*, 2 Saund. 380. ?

2. All the cases where the rules of law overrule the intention of the party are reducible to four instances: 1. where the devise would make a perpetuity; 2. where it would put the freehold in abeyance; 3. where chattels are limited as inheritances; 4. where a fee is limited upon a fee.

15 July 1728, cor. M. R.
Papillon v. Voise, W. Kel. 31.

3. Though the freehold of lands cannot be kept in abeyance, but must vest in somebody, yet there is no such rule with regard to personal estates, which may remain in suspense, and wait till a contingency happens.

T. 1734, cor. Talbot, C.
Studdholme v. Hadgson & al.
3 P. Wms. 305.
Vide *Green v. Ekins*, 2 Atk. 473.
Nicholls v. Osborne,
3 P. Wms. 419.

4. Lands are devised to *A.* and *B.*, and the heirs of the survivor in trust to sell, though the inheritance be in abeyance, yet the trustees, by a fine, may make a good title by estoppel.

T. 1735, cor. Talbot, C.
Vick v. Edwards,
3 P. Wms. 372.

2 Eq. Abr. 473. pl. 6.
Bradstock v. Schovel,
Cro. Car. 434. 543.
Weale v. Lower, Pollenz. 54.
Harg. Co. Litt. 191. n. 1.
Fearn's Cont. Rem. 4 ed.
1 vol. 522.

Quere. If any thing could operate by way of estoppel in this case, because an inheritance passed? Vide 1 *Inst.* 45. 47.

9 Dec. 1748, cor. Hardw. C.
Cunningham v. Moody, 1 Ves. 174.
Vide *Lewis Bowles & Co.*
13 Co. 79.

5. This court never puts the inheritance in abeyance but in cases of absolute necessity, and will mould it by opening the estate as best to answer the purposes of the limitations.

A—
3—A

Agreement.

Sec. 1. Where an Agreement shall be binding in Equity; by whom to be performed; and where the Person or Estate is made liable to a Covenant or Agreement.

P. 1685, cor. Guildford, C. S.
Zouch v. Swaine, 1 Vern. 320.

1. A Man buys at an under-rate and has a covenant and collateral security for quiet enjoyment, the land is evicted, the purchaser shall recover back only the consideration money, and not the full value of the land.

M. 1687, cor. Jeffries, C.
Aubry v. Keen, 1 Vern. 472.
1 Eq. Abr. 28. pl. 6.

2. A. agrees with B. lord of a manor to purchase a copyhold for two lives, such as A. shall name, A. pays 200*l.* part of the purchase-money, and was to pay the rest in three months; a court is held, three months pass, B. died suddenly, and the manor came to one who was not bound by this contract. The executors of B. decreed to refund this 200*l.*

P. 1688, cor. Jeffries, C.
Mulgrave v. Dufwood,
2 Vern. 45. 63.

Note; In *Hinton v. Hinton*, Amb. 277. Lord Hardwicke questions this case; but his reasoning was against the sentiments of the bar. No statement of this case, however, appears in the register book.

3. A copyholder for life, where by the custom there is a widow's estate, agrees to sell for his own life, and the life of such widow as he should leave at his death, the widow not bound by this agreement.

P. 1689, cor. Lds. Commissioners,
Tooke v. Hastings, 2 Vern. 97.

1 Eq. Abr. 27. pl. 3. 31. pl. 3.

Note; In *Deacon v. Smith*, 3 Atk. 329. Lord Hardwicke said, this was only a saying of the court; and dictums in reports are not greatly to be relied on without the state of the case. His lordship, therefore, sent to the register for the decree; but it did not appear by the register book whether the estate of B. was purchased before or after the bond to settle land.

4. If a person covenants to settle land, or an annuity out of land, and has no land at that time, but afterwards purchases land, that land shall be liable to the covenant, and that against a voluntary devisee.

T. 1689, cor. Lds. Commissioners,
Delabere v. Bedingfield,
2 Vern. 103.

1 Eq. Abr. 24. pl. 3. 104. pl. 6.

5. An agreement for stinting a common between lord and tenants shall be performed, though opposed by one or two humourfome tenants, such an agreement being more favoured than an agreement to inclose a common,

6. Where

6. Where an agreement made by a scrivener on behalf of his client to compound a debt, shall bind the scrivener, though not the client?

H. 1690, cor. Lds. Commissioners,
Parrott v. Wells & Ux. & an.
2 Vern. 127. 1 Eq. Abr. 25. pl. 7.

7. A. makes a voluntary settlement on B., who afterwards agrees to deliver it up without consideration; this agreement shall not bind in equity, for a voluntary settlement may be surrendered voluntarily.

H. 1696, cor. Somers, C. S.
Whitworth v. Drougby
Prec. in Ch. 69.
2 Eq. Abr. 51. pl. 2.

8. As a beneficial bargain ought to be decreed in equity, so by the same reason a losing one ought.

P. 1701, cor. Wright, C. S.
City of London v. Richmond & al.
2 Vern. 423. Prec. in Ch. 156.
2 Eq. Abr. 86. c. 6.
10 Vin. 250. pl. 15. 1 Vef. 58.

9. On casualties between articles of purchase and sealing the conveyance, the purchaser decreed to bear the loss.

M. 1702, cor. Wright, C. S.
White v. Nutt, 1 P. Wms. 81.
2 Eq. Abr. 687. pl. 3.
Vide *Cals v. Rudeley*, 2 Vern.
280. *Mortimer v. Capper*, 1 Bro. Ch. Ch. 156. *Pope v. Roots*, 7 Bro. P. C. 184. where Lord
Apsley says, the case of *Cals* and *Rudeley* is wholly misrepresented by *Vernon*.

10. A. makes a lease for three years, and in consideration of the lessee's laying out 100*l.* in improvements according to his covenant, A. covenants at the end of the term to grant a new lease at the same rent; the purchaser of the inheritance was decreed to make good the covenant.

M. 1703, Canc.
Richardson v. Sydenham,
2 Vern. 447.
1 Eq. Abr. 47. pl. 5.
Note; Here the consideration was a covenant from the lessee that he would lay out 100*l.*, which distinguishes this case from
Robertson v. St. John, 2 Bro. Cha. Ca. 140.

11. A. was entitled under a settlement to an annuity of 60*l.* expectant on the death of his father, and to a contingent interest in the real estate, in case his brother should die without issue. The father agrees to pay A. 50*l.* and to secure him a present annuity of 60*l.* for his life, in lieu and satisfaction of all his future interests under the settlement: the court established this agreement, but without prejudice to A.'s issue.

25 Jan. 1710, Dom. Proc.
Greene v. Greene, Widow, & an.
1 Bro. P. C. 316.
5 Fin. 538. c. 19.
Cited in *Legate v. Sewell*,
Glib. Rep. 141.

12. One agrees for a valuable consideration to convey lands to J. S., and afterwards confesses a judgment to J. N. If the money paid by J. S. be anywise adequate to the value of the land, it binds the land in equity and defeats the judgment. *Secur* of a mortgage or inadequate consideration.

T. 1715, cor. Cowper, C.
Finch & al. v. E. of Winchelsea,
1 P. Wms. 277.
Vide 1 Eq. Abr. 2. pl. 7.
2 Eq. Abr. 257. pl. 9.
460. pl. 11. S. C. but not S. P.

13. Agreement to leave a wife 1000*l.* three months after death cannot be enforced in equity to amend the security.

T. 1718, cor. M. R.
Bofoil v. Brander,
1 P. Wms. 460.
Vide *Lord Warrington v. Sir Stm-*
phen Langham, Prec. in Ch. 89. Cited in *Collins and Plummer*, 1 P. Wms. 107. 2 Vern. 635.
Glib. Ch. 252.

H. 1719, in Scacc.
Smith v. Watson & al.
 Bunk. 55.

By two barons (abf. Montague) it would be good against the executrix.

17 Mar. 1720, Dom. Proc.
Tufton v. Wentworth alias Gref-
well & al. 2 Bro. P. C. 243.
 5 Vin. 8. c. 32.
 15 Vin. 314. c. 10.
 2 Eq. Abr. 207. c. 3.

8 May 1721, Canc.
Duke of Marlborough v. Strong,
 5 Vin. Abr. 533. pl. 36.
 2 Eq. Abr. 19. pl. 11.

24 May 1721, Dom. Proc.
Duke of Marlborough v. Strong,
 2 Bro. P. C. 302.

M. 1722, cor. Parker, C.
Trifham v. Melbuisb,
 5 Vin. Abr. 549. pl. 10.
 2 Eq. Abr. 56. pl. 4.

14. Agreement to assign a lease, whether it shall be carried into execution against an executrix.

15. The several owners of lands in the parish of C. enter into an agreement, that a particular common should be enjoyed as cow-pasture for 99 years, and this agreement is signed by the bailiff of one of the owners, *so far as he had power*. Though no particular authority could be shewn, yet, after an acquiescence of above thirty years on the part of this owner, an authority shall be presumed, and he shall be bound by the act of his servant.

16. A. agrees with builders, before the act for building *Blenheim-House* at the expence of the crown, and recites, that he made such agreement at the instance of the D. of M. The duke is bound by such agreement, and liable to pay for work done as well after the statute as before.

17. A., on the behalf of B., enters into a contract with the workmen for building a house: this contract is binding on B., though no special authority is proved to have been given by him to A. empowering him to enter into such contract.

18. Upon a contest between M. and T. (who had a joint undivided interest in an estate, and who had agreed to set a price upon each other's moiety) concerning the meaning of their articles in writing, by which it was declared, that T. should set the price, and that upon payment of such price, together with the repayment of 600*l.* and interest paid by T. to H., he was to convey. T. sets 700*l.* for his right in writing, and M. accepts thereof; then M. prefers a bill to have the agreement performed according to the parties meaning. T. insists that he was to have 700*l.* besides the 600*l.* and interest; but M. says, that T., at the contract, valued his half but in 700*l.* (and the whole in 1400*l.*) and that it was the intent of all parties that the 600*l.* should be included in the 700*l.*, and not to be taken as two different sums. Lord Chancellor dismissed the bill, it appearing that, as the agreement was made in writing, it was unequal and against reason; for the 600*l.* paid by T. was towards a mortgage to H., and M. had paid towards the same about 530*l.*, which was 70*l.* short of T.'s payment; and though M. by answer offered to let his part go on payment of 700*l.*, including

cluding 600*l.* paid, yet the other had 70*l.* advantage, and so unequal and unjust in T. to have 1300*l.* for his moiety, which made the estate 2600*l.* in value: but costs excused on account of an impertinent examination on M.'s part.

19. Two article that whatever J. S. shall leave to either of them shall be equally divided betwixt both; such agreement good, and shall be carried into execution by this court; also, if after this, one of them contrives that J. S. shall leave part of his estate to a third person in trust for him; this is within the articles.

T. 1723, cor. Macclesfield, C.
Beckley v. Newland,
2 P. Wms. 182.
2 Eq. Abr. 21. pl. 19.
Vide *Hobson v. Trevor*,
2 P. Wms. 191.
Brady v. Cubitt, Dougl. 40. }

20. The plaintiff's house being so near the church that the ringing of the five o'clock bell in the morning disturbed his lady. The plaintiff came to an agreement in writing with the churchwardens and inhabitants at a vestry, that he would erect a cupola and clock at the church; in consideration of which, the bell was not to be rung in the morning. This a good agreement, and decreed to be binding in equity; and the court accordingly granted an injunction to stay the ringing of the bell.

H. 1724, cor. Lds. Commissioners,
Dr. Martin & Ux. v. Nutkin
and others, 2 P. Wms. 266.
2 Eq. Abr. 23. pl. 22.

21. Articles of agreement between husband and wife are binding in equity without the intervention of trustees.

H. 1725, in Scacc.
Sir Cleave Moore v. Freeman
& al. Bunb. 205.

22. Contracts entered into for a valuable consideration between two persons to restrain one of them from setting up or exercising a particular trade or employment within a certain limited district are valid.

22 Feb. 1727, Dom. Proc.
Chefman & Ux. v. Nainby,
3 Bro. P. C. 349. 5 Vin. 96.
(n.) to c. 21.

23. An agreement was signed by the parties, and by consent made an order of court, to submit to such decree as the court should make, and neither party to bring his appeal, yet the cause was allowed to be reheard.

H. 1733, cor. Talbot, C.
Buck v. Fawcett, 3 P. Wms. 242.
2 Eq. Abr. 82. pl. 7. 492. pl. 8.

24. One articles to buy land, and the title is under a will not proved in equity against the heir, yet, in some cases, equity will compel the purchaser to accept the title.

T. 1733, cor. King, C.
Colton v. Wilson & al.
3 P. Wms. 290.
2 Eq. Abr. 680. pl. 10.

Former decree having discharged Wilson from his purchase. *Vide* *Marlow v. Smith*, 2 P. Wms. 201.
Shapland v. Smith, 1 Bro. Ch. Rep. 75. *Cooper v. Denne*, 1 Vef. jun. 565.

Lib. Reg. A. 1732. fo. 374. S.C.
nomine *Coulton v. Roulby*, the
and others, 3 P. Wms. 223. 227.

25. A. the father articles with a carpenter to pay him 1000*l.* to build a house on his estate, the
C 4 carpenter

M. 1733, cor. Jekyll, M. R.
Lechmere, Esq. v. Lord Carlisle
and others, 3 P. Wms. 223. 227.
Ca. Temp. Talb. 80.

Vide 2 Eq. Abr. 31. pl. 42.
258. pl. 12. 462. pl. 17.
501. pl. 35. S. C. but not S. P.
V. de Holt v. Holt, 2 Vern. 322.
Vide 2 Eq. Abr. 31. pl. 42. (n.)
S. P.

P. 1734, cor. Talbot, C.
Johnson v. Ogilby and others,
3 P. Wms. 277. 279.
2 Eq. Abr. 31. pl. 39. S. C. but
not S. P.

T. 1734, cor. Talbot, C.
Annesley v. Alhurst,
3 P. Wms. 282.
2 Eq. Abr. 31. pl. 41.

2 July 1755, cor. M. R.
Flights v. Cook, 2 Vef. 619.
Vide Warrington v. Langham,
Prec. in Ch. 89. 1 Eq. Abr. 132.

T. 1790, cor. Thurlow, C.
Calverley v. Williams, et c. contra.
1 Vef. jun. 210.

Auctioneer at a sale cannot con-
tradict the written conditions;
such verbal declarations are in-
admissible. 1 Term Rep. C. B. 289.

carpenter covenants to build it; *A.* dies. The
heir of *A.* shall compel the building of the house,
and the executor shall pay for it.

S. C. Though by a deed 5 *per cent. per ann.* was
agreed to be allowed, yet, it appearing that the
money had been placed in the government funds,
which yielded but 4 *per cent.* the court reduced the
interest to 4 *per cent.*

26. An attorney, on behalf of his client the de-
fendant, promises to pay 500*l.* to the plaintiff;
this being done by the authority of the client, the
attorney is not liable, but only the client. *Secus*
if the attorney had no authority from his client to
make this engagement.

S. C. Brokers or factors, who act (or agree)
for their principals, not liable in their own capa-
cities.

27. A trust-estate was decreed to be sold for
the payment of debts and legacies, and to be sold
to the best purchaser. *A.* articles to buy the estate
of the trustees, and brings a bill to compel them
to perform the contract. The trustees by their
answer disclose the matter: the court will make
no new decree, but leave the former decree to be
pursued.

28. *A.* covenants that a specific sum should be
paid to *B.* if *B.* survived: *A.* having aliened part
of it on a bill by *B.*, *A.* gave security that it should
be forthcoming.

29. Purchaser not entitled to a conveyance of
part, though answering the general description in
the advertisement of sale, as it was not in the
contemplation of either party at the time of the
purchase or conveyance, the purchaser being re-
ferred to a more particular description, which did
not include that part, and the surrender having
been made according to that and from his own
instructions.

S. C. If one party thought he had purchased
bonâ fide part of an estate, which the other thought
he had not sold, it is a ground to set aside the con-
tract. If both understood the whole was to be con-
veyed, it must, otherwise if neither understood so.

S. C. Small variation in a general description of
land not material.

S. C. Any person undertaking to describe bound
by the description, whether constant or not.

30. Agree-

30. Agreements for sale of an estate, especially if by auction, depend on the *bona fides* of the transaction; therefore trifling errors in the description are not material.

S. C. An advertisement of an estate for sale by auction described it all as freehold, though a small part was held at will. After execution of articles, a treaty for an exchange of that part took place; pending which, at the time appointed for completing the purchase, purchaser took possession forcibly, but proceeded in the treaty afterwards till he finally refused to agree to the purchase. On bill by vendor the purchase-money was decreed to be paid, with 4 *per cent.* from the time it ought; but an inquiry was directed as to what ought to have been the compensation at that time for the part not freehold, and that, with the outgoings, to be deducted.

T. 1790, cor. Thurlow, C.
Calcraft v. Roebuck,
1 Ves. jun. 211.

31. At an auction one person only bid for the vendor to 75 *l.* an acre, upon a private notice to the auctioneer; then, after a contest with real bidders, the estate was bought at 101 *l.* 17 *s.* an acre, and the purchaser some days afterwards paid the duty, and confirmed his purchase. He was decreed to perform the contract with costs.

16 Feb. 1793, cor. Sir P. Arden,
M. R.

Bramley v. Alt, 3 Ves. jun. 620.

As to the point whether a vendor's having employed persons to bid for him at an auction, discharges the purchaser from his contract: *Vide* Conolly and Parsons, 3 Ves. jun. 625. (n.)
Calverley v. Williams, 1 Ves. jun. 210. *Calcraft v. Roebuck*, 1 Ves. 211.

S. C. Where all the bidders at an auction, except the buyer, are bidding for the seller, without notice, and, the buyer is *thereby induced* to give more than the value, neither courts of law nor equity will support such a contract.

S. C. (N.) It is no objection to a sale by auction that persons are employed by the vendor to bid for him *without public notice*.

See more under *Copyhold, Landlord and Tenant, Purchase, Sale*.

Sec. 2. Where Equity will relieve on a Covenant or Agreement; and herein of unreasonable Agreements.

1. *A.* An attorney being sick of the disorder whereof he died, takes *B.* as his clerk, and receives with him 120 *l.*, and by articles agrees with the father of *B.* to return 60 *l.* of the money if *A.* died within the year; *A.* died within three weeks: the executor of *A.* is decreed to pay back 100 guineas.

T. 1687, cor. Jeffries, C.
Newton v. Rowse, 1 Vern. 462.
1 Eq. Abr. 303. pl. 3.

2. Agree-

T. 1687, cor. Jeffries, C.
Bill v. Price, 1 Vern. 467.

2. Agreement obtained from young heirs and securities taken for the payment of great sums of money on the death of their ancestors, for goods sold at extravagant prices, set aside on payment of the true value which each person respectively received; and though the security given by the young gentlemen was joint, yet one not to answer for what the other received.

M. 1690, Canc.
Woodward v. Simpson,
 2 Vern. 186.

3. *A.* articles to sell lands to *B.* for 15,000 *l.* the whole to be paid in money, or so much land returned as would make up what he paid short of 15,000 *l.* *A.* conveys part of the lands to *B.*, and by his persuasion values that part at an undervalue, and then *B.* sells this part to *C.*, and afterwards would have returned so much of the lands as would make up the 15,000 *l.* Articles set aside as unreasonable, but the sale to *C.* to stand.

M. 1692, Canc.
Casv. Rudels & al. 2 Vern. 280.
 1 Eq. Abr. 25. pl. 8.
 In *Pope v. Roots*, 7 Bro. P. C. 184., Lord Apsley said this case was wholly misrepresented by *Vernon*.

4. *A.* articles on behalf of *B.* to purchase some houses in *Jamaica*, and covenants to pay 800 *l.* for the same, and the houses are afterwards destroyed by an earthquake; though *A.* had no effects of *B.* in his hands, yet decreed him to pay the 800 *l.*

Note: By the printed cases in the House of Lords it appears that *A.* admitted in his answer to have 700 *l.* of *B.*'s in his hands, residue of the purchase-money; and the decree for payment was founded on a good title having been made to him of the premises.

M. 1699, cor. Somers, C.
Small v. Lord Fitzwilliams,
 Prec. in Ch. 102.
 2 Eq. Abr. 56. c. 2. 242. c. 2.

5. Equity will not relieve against the terms of an agreement, though it may seem in the nature of a penalty.

20 Mar. 1701, Dom. Proc.
Sir Basil Firch v. Moore,
 Colles' P. C. 188.

6. A party to an agreement cannot allege it unfair against a person to whom it is assigned, he himself being a subscribing witness to the assignment.

20 Feb. 1702, Dom. Proc.
Ivye v. Apsley, Colles' P. C. 267.
 Prec. in Ch. 199.
 2 Eq. Abr. 242. c. 3.
 4 Vin. 406. 10 Vin. 139.
 1 Vern. 98, 99. Ca. Temp.
 Talb. 104. Cases respecting
 stat. 5 & 6 Edw. 6., wherein
 relief was granted, Ca. Temp.
 Talb. 141. 3 P. Wms. 393. and
 in 1 Bro. Ch. Ca. 121. a perpetual injunction was granted upon public policy, though the office was not within the stat.

7. Agreement to pay 600 *l.* on the other's procuring a commission of captain in the marines for him; and bond for the money, if the commission be procured accordingly, though the obligor refuse to accept it, on the scruple of taking an oath required by statute, yet he will not be relieved against the bond in a court of equity.

27 May 1720, Dom. Proc.
Stanhope, Widow, & an. v. Toppe,
 Bart., 2 Bro. P. C. 183.
 5 Vin. 533. c. 32.
 2 Eq. Ca. Abr. 55. (n. to ca. 1.)
Gre. & Rud. of Law & Eq. 18.
 c. 3.

8. Equity will not carry unreasonable bargains into execution: and therefore where *A.* agreed to pay *B.* 240 *l.* a-year for his board, lodging, &c. the agreement was set aside as being unreasonable, and the master was directed to inquire what accommodation

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commodation *A.* had, and what *B.* reasonably deserved for the same, and to make him an allowance accordingly.

9. Equity will not supply a defect in a written agreement, intended to be a part of the agreement but not inserted in it.

T. 1720, in Scacc.
Bingsted v. Coleman, *Bunb.* 63.

10. *A.* articles to buy land, and pays part of the purchase-money; afterwards he enters into several orders of court to pay the residue by such a day, or in default thereof to give up the articles, and lose what he had before paid. The court will relieve, though these articles have not been complied with.

T. 1722, cor. Macclesfield, C.
Vernon v. Stephens, 2 P. Wms. 66.
2 Eq. Abr. 56. pl. 3.
Vide Mackreth v. Marlar, cor. M. R. 10 July 1736, where his Honour decreed a contract to be delivered up, the purchaser having died shortly after, and a suit for an account of his assets being then depending.

11. An agreement to give 40 years purchase for *fen-land*, set aside as extravagant.

Abt. 19. c. 14. *Vide post*, sec. 3. pl. 35. et *vide* Lewis and Lord Lechmere, *post*, sec. 3. pl. 38.

12. A court of equity will relieve against the penalty, for not performing an unreasonable contract.

13 Feb. 1722, Dom. Proc.
Thompson v. Harcourt,
2 Bro. P. C. 415.
5 Vin. 548. c. 9.

13. If an agreement or contract for South-Sea stock be executed, the court will not break into it; if it be executory, the plaintiff must seek his remedy at law.

M. 1723, in Scacc.
Cappur v. Harris, *Bunb.* 135.

14. It is against natural justice that any one shall pay for a bargain which he cannot have; as if I article to buy an house, and the house is burnt down before the day of payment, I am not bound to pay the money.

P. 1724, cor. M. R.
Stent v. Bailis, 2 P. Wms. 220.
2 Eq. Abr. 57. pl. 5.
689. pl. 10.
Vide Cafe v. Rudelt, 2 Vern. 230.
This case was reheard before Lord King in M. 1725. *Vide* 2 Eq. Abr. 57. (n.)

15. A written agreement being unreasonable, the court would not carry it into execution, but decreed that it be delivered to the party for whose benefit it was designed, that he may have an opportunity to make the most of it at law.

27 Feb. 1726, Canc.
Squire v. Baker,
5 Vin. Abr. 549. pl. 12.
2 Eq. Abr. 58. pl. 9.

16. An executor in trust, who had no legacy, and where the execution of the trust was likely to be attended with trouble, at first refused but afterwards agreed with the residuary legatees, in consideration of 100 guineas, to act in the executorship; and he dying before the execution of the trust was completed, his executors brought a bill to be allowed these 100 guineas out of the trust-money in their hands; the court disallowed the demand.

M. 1732, cor. M. R.
Gould v. Fleetwood,
3 P. Wms. 251, 252. N.
Vide Salk. 155. Baldwin and Banister, Powell and Glover.
Scattergood v. Harrison,
Mof. 128.

17. There

H. 1736, cor. Talbot, C.
Savage v. Taylor,
 Co. Temp. Talb. 234.

17. There may be a degree of unfairness in obtaining articles for the purchase of an estate, for which this court will not set them aside; but will refuse its aid to carry them into execution: and if the party who obtained such articles hath been in possession, and made lasting improvements, he shall be allowed for them on consenting to deliver up the articles and account for the profits: otherwise if he goes to law, and falls there.

29 April 1744, Dom. Proc.
Made v. Webb,
 4 Bro. P. C. 497.

18. In treaties for an agreement, a wilful and industrious concealment of a material fact, by one of the parties, in order to keep the other in ignorance, and to profit by that ignorance, is a gross fraud, and will in equity set aside the contract.

2 July 1747, cor. Hardw. C.
Cory v. Cory, 1 Ves. 19.

19. Agreement, if reasonable, and to settle family disputes, and no unfair advantage, not to be set aside because the party was drunk, or paternal authority exercised.

7 Mar. 1750, cor. M. R. abf. C.
Cocking v. Pratt, 1 Ves. 401.
Vide Griffith v. Trapwell,
 26 June 1732.

20. Agreement relating to distribution of personal estate, set aside though ratified, the value appearing to be greater than was known at the time of agreement.

M. 1756, cor. Hardw. C.
Rose v. Rose, Amb. 331.
Vide Delamere v. Smith, 1 Ch.
 Ca. 110. Voluntary compositions must be paid at the time, 1 Eq. Abr. 28. pl. 3. 1 Vern. 210.

21. Court relieved against breach of an agreement by receiving rent, on making compensation.

H. 1786, cor. Thurlow, C.
Henley v. Aiton,
 2 Bro. Ch. Rep. 17.

22. An agreement for an annuity, to be paid during the joint lives of plaintiff and his uncle, in consideration of a sum to be paid on the death of the uncle without issue, and the annuity paid during the uncle's life. Bill to set it aside dismissed.

T. 1790, cor. Thurlow, C.
Friestley v. Wilkinson,
 1 Ves. jun. 214.

23. An Apothecary gave his patient 50 guineas to receive 500*l.*, or an annuity of 100*l.*, if he should survive a year, which he did: bill against executors dismissed, as plaintiff could not succeed at law, but without costs, on account of the money actually advanced, which must have been repaid upon a bill to set aside the agreement.

H. 1792, cor. Buller, J. abf. C.
Weymouth v. Bowyer,
 1 Ves. jun. 416.

24. *A.* agreed to sell goods to *B.*, to be accounted for in part of a debt to *B.*; *C.* with notice agreed to sell the goods as factor, not allowed to retain for a debt to him from *A.*

S. C. Property in a cargo transferred by bill of sale signed by vendor and vendee: but by a new agreement, signed by them before they parted, that

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that it shall be sold and accounted for by the factor for vendor, it is reduced to an agreement, and therefore remedy in equity.

See more under *Consideration, Deeds, Fraud*.

Sec. 3. Where a Covenant or Agreement shall be performed in Specie, and where not.

1. **B**ILL for an execution of an agreement; it appearing by proof that the agreement was only to quit the possession, and not extending to convey the lands, the bill was dismissed.

H. 1682, cor. North, C. S.
Curard v. Vann, 1 Vern. 122.
1 Eq. Abr. 24. pl. 4. 25. pl. 1.

2. A man covenants that lands settled for a jointure are 400 l. per annum, the jointure being deficient, the heir decreed to make good the covenant in specie.

H. 1683, cor. North, C. S.
Spauke v. Spauke, 1 Vern. 217.
1 Eq. Abr. 221. pl. 7.

3. Equity will not decree an execution of articles, unless obtained fairly without surprise or circumvention.

H. 1683, cor. North, C. S.
Philips v. D. of Bucks,
1 Vern. 227. 229.
1 Eq. Abr. 18. pl. 10.

A. articles for the purchase of B's estate, pretending he bought it for one whom B. was desirous to oblige, but in truth bought it for another, and by that means got the estate at an undervalue. Equity will not decree an execution of these articles.

4. Covenant to save harmless decreed in specie, to wit, the principal was decreed to indemnify the surety.

M. 1683, cor. North, C. S.
E. of Ranelagh v. Hays,
1 Eq. Abr. 17. pl. 6.
1 Vern. 189. 2 Ch. Rep. 146.

5. If an heir sells a reversion in the life of his father at an undervalue, a court of equity will not in favour of such a purchaser decree the heir specifically to perform a covenant for further assurance.

M. 1684, cor. North, C. S.
Johnson, Executor, v. Nott,
1 Vern. 271.

6. A. on the marriage of his son covenants to purchase lands and settle them to the use of his son for life, remainder to the heirs male of his body. The son dies, leaving issue a son, who brings a bill against the executors of A. for a performance of this covenant. Bill dismissed in regard the plaintiff's father would have been tenant in tail if the estate had been settled, and might have barred it.

M. 1687, cor. Jeffries, C.
Cann v. Cann, 1 Vern. 480.
In 1 P. Wms. 567. 723. and in
2 Eq. Abr. 417. pl. 5. is a case
of the same name, but is not S. C.

7. A. having taken a lease of a brewhouse, and covenanted to repair, assigns it by way of mortgage,

M. 1692, cor. Lds. Commissioners,
Sparks v. Smith & al.
2 Vern. 275. 1 Eq. Abr. 47. pl. 6.

Vide Pilkington v. Shaller, 8 Vern. 374., where an assignee, though he never entered, and had lost his mortgage-money, was compelled by law to pay the rent, and having sued in equity could have no relief.

P. 1697, cor. Somers, C.
Holtbam v. Ryland,
Nelf. Cb. Ca. 205.
1 Eq. Abr. 18. pl. 8.

M. 1697, Cane.
Marq. Normanby v. D. of Devon,
2 Freem. 216, 217.
Vide Bromley v. Fettiplace,
2 Freem. 246.

6 June 1698, Dom. Proc.
Bradshaw v. Sutton,
Collet P. C. 25.

H. 1700, cor. Wright, C. S.
Bromley v. Fettiplace,
2 Freem. 245, 6, 7.

This seems evidently to be the same case as Bromley and Jeffries, (post, pl. 12.) reported by Vern., and in Prec. in Ch.; but as those reporters have differed in their statement of the case, this may probably serve to explain the variation and elucidate the case.

Vide Lord Marq. Normanby v. D. of Devon, 2 Freem. 217.

to *B.* The premises being out of repair, the lessor brings his bill against *B.* to compel him to perform the covenant. *B.* never having been in possession, the court would not decree him to perform the covenant *in specie*, but left the plaintiff to recover at law as he could.

8. The condition of a bond was to settle certain lands in such a manor by such a day: the obligor died before the day, and so saved the bond at law. Decreed the lands to be settled.

9. Where no action at law will lie to recover damages, there equity will not execute an agreement in specie, and make that good which is not so by law.

10. Agreement to procure *A.* to convey to *B.* decreed to be performed in specie.

11. Sir *R. B.* having issue only daughters, settled his estate upon trustees to sell, with a power of revocation. Afterwards, on the marriage of his daughter with plaintiff, by deed reciting his intention, that the estate should go to the issue male of the plaintiff, he agreed that if plaintiff should desire to purchase same, he should have it for 1500 *l.* less than the best purchaser would give. Sir *R. B.* afterwards made his will, and gave plaintiff 1500 *l.* to be raised out of his estate, but did not mention if it should be in satisfaction of the 1500 *l.* to be allowed him in case of a purchase. Plaintiff brought his bill to have the agreement executed, and an allowance of 1500 *l.* in the purchase-money. *Per* C. S. It is impossible to know what the best purchaser would give, and it cannot be exposed to sale before a master, because whoever should bid for the estate, cannot have it, since plaintiff is to have it 1500 *l.* cheaper. This court will not decree an agreement in specie, where no action at law will lie for damages by the non-performance of it, but if a marriage agreement be so ill worded, that an action at law would not lie for the breach of it, equity will decree a performance. It was also held clearly, that plaintiff should not have both the 1500 *l.* legacy and the allowance also on his purchase, for the legacy is to be raised out of the same lands, which are otherwise disposed of. Bill dismissed, as to executing the agreement in specie, but plaintiff was offered a decree for his legacy, upon being enjoined from suing at law.

12. 4.

12. *A.* on marriage of his daughter to *B.* covenants that *B.* shall have his land called *C.* for 1500*l.* less than any other person would give for it, and dies. The court refused to decree a specific performance of this agreement, by reason of the uncertainty, and its not being mutual.

of revocation; then he marries a daughter, and covenants that the husband shall have the estate 1500*l.* cheaper than any other person. After, by will, he revokes the settlement, and gives the husband 1500*l.* and dies. This legacy held to be a satisfaction of the 1500*l.* secured by settlement. *Vide Fitzherbert's case*, cited in *Shelly's case*, 1 Co. 160. *Lady Gainsboro's case*, 2 Vern. 251.

13. One is bound to transfer 300*l.* *East-India* stock before 30th September then next. Though the stock was much risen, yet the defendant decreed to transfer the 300*l.* stock in specie, and to account for all dividends from the time it ought to have been transferred.

14. *B.* in consideration of a parol agreement with *A.* for a lease of ground, pulled down divers old houses, and built many new, and acted uniformly as owner; and *B.* made leases, and received the rents. *A.* in his last sickness bade *B.* have leases prepared according to the agreement, and a precedent which he gave him, which was done; but the leases not executed 'on account of some mistake in them, and *A.* died. Though this agreement was not originally reduced to writing, yet being so far materially executed on *B.*'s part, it ought to be reciprocally performed on the other, equity will decree it according to the leases so prepared.

15. *A.* supposing he has right, enters into an agreement to sell to *B.*, who brings a bill for specific execution against *A.*, and also against *C.*, who appears to be the true owner, and so insists in his answer. This bill dismissed, as well against *A.* as *C.*, and the decree of dismissal was affirmed.

16. *A.* made a lease of ground, and lessee covenanted to build; he then assigned his lease by way of mortgage, and died insolvent. Bill by lessor against the mortgagee to execute this agreement in specie. Decreed the mortgagee to build according to the agreement, and not to quit the lease, though he should be content to lose his money.

17. Where one party to an agreement trifles, or shews a backwardness in performing his part of it, equity will not decree a specific performance in his favour; especially, if the circumstances and situation

H. 1700, cor. *Wright*, C. 8.
Bramley v. Jeffries & al.

2 Vern. 415.

1 *Eq. Abr.* 18. pl. 11.

This case is thus reported in *Proc. in Ch.* 138. One settles his estate on trustees to be sold for payment of his debts, with power

M. 1700, Cane.

Gardner v. Pullen, 2 Vern. 394.

1 *Eq. Abr.* 26. pl. 4. 92. pl. 4.

7 April 1701, Dom. Proc.

Lester v. Foxcroft,

Colles' P. C. 108.

Cited 2 Vern. 456. *Gillb. Rep.*

4. 11. *Proc. in Ch.* 519. 526.

though not hitherto reported at large.

12 April 1701, Dom. Proc.

Cornwall v. Williams,

Colles' P. C. 117.

M. 1701, cor. *M. R.*

Anon. 2 *Freem.* 253.

Vide Pilkington v. Shaller,

2 Vern. 374.

Sparkes v. Smith, 2 Vern. 275.

8 Feb. 1702, Dom. Proc.

Hayes v. Caryl & al.

1 Bro. P. C. 27.

5 *Vin.* 538. c. 18.

2 *Eq. Abr.* 16. c. 2.

Gr. & Rad. of Law & Eq. 18.
c. 6.

Vide 2 *Fecm.* 246.

H. 1706, cor. Cowper, C. S.

Coleman v. Upcott,

5 *Fin. Abr.* 527. pl. 27.

2 *Eq. Abr.* 16. pl. 3. 45.

pl. 9. (n.)

Vide *post*, sec. 5. pl. 20.

H. 1708, cor. Cowper, C.

Collins v. Plummer,
3 *P. Wms.* 207. *Gillb. Ch.* 252.

2 *Eq. Abr.* 36. pl. 1.

T. 1718, cor. M. R.

Bofoil v. Brander,

1 *P. Wms.* 461.

Vide *Lord Warrington v. Sir Stephen Langham*, *Proc.* in Ch. 89.

Collins v. Plummer, as stated in
4 *Vars.* 635.

T. 1709, cor. Cowper, C.

Allen v. Harding,

2 *Eq. Abr.* 17. pl. 6.

3 April 1710, Dom. Proc.

Ball v. Coggs and others,

1 *Bro. P. C.* 296.

situation of the other party are materially altered in the mean time.

18. If a man (in company) make an offer of a bargain, and write it down, and sign it, and another take it up and prefer his bill, equity will decree a specific performance of this bargain.

19. By a settlement *A.* is made tenant for life; remainder to the heirs of his body by his wife; and in same deed *A.* covenants not to suffer a recovery, but that the lands shall be enjoyed according to those limitations. *A.* afterwards suffers a recovery, and devises these lands. On a bill for a specific performance of the covenants, it was decreed that the lands devised were not affected, though the covenant was good to bind the assigns, and such covenant being at first accepted, equity ought not to vary or alter it.

A man on his marriage makes a settlement, whereby the lands were limited in remainder, after his and his wife's death, to the heirs of his body begotten on his wife, and covenants not to bar the intail or suffer a recovery; and having one daughter, to whom on her marriage he had given a good portion, he suffers a recovery, and by will devises the estate to his daughter for life, and to her first, &c. sons in tail, with remainders over. On a bill for a specific performance of the covenant, the court would not decree it, but left the party to recover damages at law for breach of the covenant.

20. *A.* curate of *N.* covenanted with *B.* to build a house upon the glebe land. *B.* brings a bill for a specific performance of the agreement, and it was insisted for defendant that the covenant was too loose and uncertain to be performed in specie, both in respect to time and value, and founds only in damages; decreed a convenient house to be built, and for that purpose each party to choose two commissioners, and if they cannot agree, then to resort to the ordinary of the diocese.

21. The partners in certain brass works enter into articles with *A.* that he shall serve them as their manager and overseer during his life; and, besides a stipulated yearly salary, he was to have 3s. 6d. for every hundred weight of brass wire made by him, or any other person during his life. *A.* was afterwards

afterwards discharged by the partners from their service, and on a bill brought for a specific performance of these articles, it was decreed, that the plaintiff was entitled to all the advantages thereby stipulated for him, except 3s. 6d. payable to him for every hundred weight of brass wire made at the mills; which Lord Cowper conceived was intended as a reward attending the produce of the works, *during such time only as the plaintiff supervised the same.* But this part of the decree was reversed, and he was held to be entitled to this allowance *during his life.*

22. *A.* enters into an agreement in writing with *C.* for the purchase of an estate, if a good title could be made. *B.* (a stranger) afterwards files a bill, claiming part of the lands; *C.* buys in his claim. *C.* is entitled to a specific execution of the agreement.

23 May 1712; Dom. Proc.
Master v. Cook, Cilles' P. C. 433.

23. *A.* being tenant for life under a settlement, with remainder to his wife for her jointure, remainder to the issue male of the marriage, remainder over, with a power to revoke all the uses, except those to his wife and her issue; agrees, that in consideration of her surrendering her jointure estate, so as to enable him to suffer a recovery, and raise 6000*l.* to pay his debts, he would re-settle his whole estate to particular uses. The surrender was made and the money raised, but no re-settlement made according to the agreement. Held, that this agreement having been in part performed, the parties were entitled to a specific execution, and decreed accordingly.

27 April 1714, Dom. Proc.
Herbert & Ux. v. Lord Winchelsea & al. 1 Bro. P. C. 440.

24. Bill to have a specific performance of an agreement upon this case. *A.* during his minority, by himself and guardian, enters into articles with defendant to let him a farm at a certain rent, &c. Defendant enters upon the farm, and continues the possession, and pays the rent after *A.* came of age. After that *A.* conveys the inheritance to the plaintiff, and then defendant quits the farm, insisting that he was only a tenant at will, and refuses to accept a lease or execute a counterpart, because *A.* being an infant at the time of making the agreement, was not bound, and therefore defendant ought not to be bound by it. Decreed per Harcourt, C. That the plaintiff should execute a lease to the defendant, and the defendant execute a counterpart

T. 1714, cor. Harcourt, C.
Clayton v. Ashdown,
9 Vin. Abr. 393. pl. 4.
2 Eq. Abr. 516. pl. 4.

of such lease to the plaintiff, in pursuance of the articles; and defendant to pay costs.

10 May 1714, Dom. Proc.
Cusack v. Cusack,
1 Bro. P. C. 470.

25. C. by articles on his marriage with his first wife covenanted, that all the lands which he should purchase during her life should descend to or be settled upon the heirs male of her body by him begotten. No settlement was made pursuant to these articles, but C. upon his marriage with a second wife, settled his estate to different uses. Held, that the eldest and only son of the first marriage was entitled to a specific performance of these articles, and a conveyance was decreed accordingly.

18 July 1715, Dom. Proc.
Ogle v. Sanjom, Executor,
1 Bro. P. C. 530.

26. Two captains of ships of war enter into an agreement, that all prizes taken by either of them, whether in the ships they then had, or in any other ships which they might then after command, should be equally divided between them. One of them changed his ship, which, meeting with an accident, was ordered to be laid up, and it was some time before he got another: the other captain continued cruising all the time, but objected to account for the prizes which he took, during the interval of his partner being unemployed. Held, that he was accountable for all the prizes taken, from the date of the agreement.

M. 1718, cor. Cowper, C.
Ortred or Outram v. Round,
4 Vin. Abr. 203. pl. 4.
2 Eq. Abr. 145. pl. 4.
Lord Cowper in this case said, it is a great breach upon the wisdom of the law to compel a husband to procure his wife to levy a fine, and force her to part with her land without her consent. *Vide* Barrington v. Horn, 2 Eq. Abr. 17. pl. 7., where a specific performance was decreed; and Hall v. Hardy, 3 P. Wms. 189. S. P. and Winter and Devereux there cited.

27. Husband and wife, for a reasonable consideration, by lease and release, conveyed the wife's land in fee, and covenanted that the wife should levy a fine of the same to the use of the purchaser. She refused to levy a fine. Plaintiff brought his bill to have his title perfected by a specific performance of the covenant, and a precedent was cited, where a specific performance had been decreed in the like case; but Lord Chancellor would not decree a specific performance in this case, because upon such a decree the husband could not compel his wife to levy a fine; and if she would not comply, imprisonment would fall upon the husband for contempt, which was the ill consequence of the decree in the cited case. His lordship, therefore, directed the defendant to refund the purchase-money with costs.—*Vide* more tit. *Fines*.

M. 1719, cor. Parker, C.
Cud v. Rutter, 1 P. Wms. 570.
2 Eq. Abr. 18. pl. 8.
Cited in *Preced.* in Cb. 534. *nomine*
Should v. Butler.

28. A bill will not lie for a specific performance of an agreement to transfer *South-sea* stock—*Secus* where the thing contracted for may be particularly commodious to the party.

29. Bargain

29. Bargain for corn, to be delivered upon a day certain at such a market, at such a price, and the corn is not delivered according to the contract, the buyer shall not by a bill in equity compel the seller to a specific performance of this agreement, but is left to his remedy at law for breach of the agreement to recover damages, (*i. e.*) the difference between the price agreed on by the parties; and the price of corn upon the market day.

30. A court of equity will not decree a specific execution of articles, where they appear to be *unreasonable, or founded in fraud.*

Vide Prec. in Ch. 76. Gilb. Ch. 243. 1 Vern. 227. 2 Vern. 186. 10 Mod. 503. Ca. Temp. Talb. 234. 3 Atk. 383. 21 Vin. Abr. 540. pl. 1. 2 Bro. P. C. 183. 396. 415. 533. Bro. Rep. 440. Prec. in Ch. 575.

31. Where a manner of obtaining an agreement is not strictly just and regular, a court of equity ought not to decree a specific performance, although the agreement be in part executed.

22 May 1721, Dom. Proc.
Roxford v. Cresswick & Us.
2 Bro. P. C. 296.
5 Vin. 533. c. 34.

32. *A.* articles with *B.* for the purchase of an estate of 180 *l.* per annum, for which he was to give 35 years purchase, and pays 50 *l.* in part; but discovering that 30 *l.* per annum of the lands were copyhold, refused to go on. On a bill by *A.*, equity will not decree a specific execution of this agreement, being unequitable, but will order the 50 *l.* to be paid back.

T. 1721, Canc.
Sir Harry Hicks v. Phillips,
Prec. in Ch. 575.
2 Eq. Abr. 18. c. 10.
Vide Prec. in Ch. 29. 538.
10 Mod. 503.
21 Vin. Abr. 543. S. P.
Part of the Lord Chancellor's decree in this cause appears to be inaccurately reported. *Vide* Notes to this case in Prec. in Ch. 575.
(corrected from the register's book).

33. The bill was to have execution of articles for the sale of some copyhold lands to plaintiff, on payment of 538 *l.* to defendant *R.*, a guinea being paid in part; and to compel the lord of the manor to admit plaintiff in fee according to the agreement, which was decreed; but there being no tender of a surrender to the lord, and consequently no refusal, he was to have his costs.

H. 1722, cor. Parker, C.
Sayle v. Reeves & al.
Gilb. Eq. Rep. 188.
2 Eq. Abr. 25. c. 27.
Notes; Lord Chancellor said, this seemed to be a bill brought to get at the opinion of the court, whether plaintiff had bought a good title; but that the court would not determine upon.

34. Where a contract has lain dormant for many years, and nothing done by either party in pursuance of it, a court of equity ought not to decree a specific performance.

13 Mar. 1722, Dom. Proc.
Wingfield v. W'balley,
2 Bro. P. C. 447.
4 Vin. 432. n. to c. 17.
5 Vin. 534. c. 38. 2 Eq. Abr. 3.
n. to c. 7. 19. c. 12.

35. *B.* being seised in fee of an estate in *Holbeck*, by articles sold same to *A.*, covenanting to make a good title by 29th September 1720, and *A.* agreed to pay for same 800 *l.*, being 40 years purchase. A bill was filed in the Exchequer for a specific performance of this agreement, which was decreed.

T. 1722, in Dom. Proc. upon appeal from Scacc.
Keene v. Stukeley,
Gilb. Eq. Rep. 155.
2 Eq. Abr. 19. pl. 14.
2 Bro. P. C. 396.
Vide Lewis and Lord Lechmere, *post*, pl. 38.

It being proved in the cause that *B.* had left his deed with *A.*, and that there was no just objection to his title, this was admitted in the Exchequer, and therefore the proofs were not read, or marked as read. The Lords did not resolve whether an exorbitant bargain of 40 years should be decreed to be carried into execution in equity, because *B.* did not prove that he had made out his title by 29th September according to his covenant, inasmuch as his proofs were not read or marked in the Exchequer, and the appellant's admittance of that indenture was not entered.

T. 1722, in Scacc.
Armiger v. Clarke,
Bund. 111.
Vide 2 Mod. 87.

36. Bill for a specific performance of articles for the purchase of lands dismissed, because the lien or remedy was not mutual.

T. 1722, cor. Macclesfield, C.
Derison v. Westbrook,
5 Vin. Ab. 540. pl. 22.
2 Eq. Abr. 161. pl. 8.

37. Bill for a specific performance of a contract for 1000*l.* *York-Buildings* stock, at 105 per cent. dismissed, for that this court will not carry these sorts of contracts into execution, but leave the parties to their remedy at law for the difference, but no costs, because the defendant's answer was falsified in several particulars.

T. 1722, cor. Parker, C.
Lewis v. Lord Lechmere,
10 Mod. 503. 2 Eq. Abr. 20.
pl. 17. 689. pl. 8.

(a) It appears his lordship's decree was swayed by this circumstance.

38. Bill for specific performance of articles for the purchase of an estate dismissed with costs, because the title was not laid before the vendee's counsel within the time limited, and the South-Sea stock from whence the purchase-money was to be raised having fallen (a) in the mean time 168 per cent.

Vide *Hicks v. Phillips*, Prec. in Ch. 575. 2 Eq. Abr. 18. 168. In *Keen v. Srukeley*, in Scacc. Gilb. Eq. Rep. 155. it was determined to enforce a specific performance of an agreement for a purchase if the price was reasonable at the time of the sale, however disproportionable after accidents might make it; but in the principal case the price agreed for was forty years purchase. The Lords therefore reversed the decree of the court of Exchequer enforcing specific performance.

Upon mutual articles there ought to be mutual remedies; and therefore the vendor may come into equity as well as the vendee.

28 Mar. 1724, Dom. Proc.
Brereton v. Cowper,
2 Bro. P. C. 535.

S. C. Bill brought by the vendor for a specific performance of articles dismissed, because the vendor had covenanted to convey freehold, and one or two acres proved copyhold, though the vendor offered to procure an enfranchisement of the copyhold, or make any compensation in the price.

The Lords therefore reversed the decree of the court of Exchequer enforcing specific performance.

M. 1724, cor. Parker, C.
Parks v. Wilson, 10 Mod. 515.
2 Eq. Abr. 22. pl. 20.
Vide 2 P. Wms. 191. 1 Ves.
391. 409. 1 Str. 533. Fombl.

39. Wilful misrepresentation of the yearly value of an estate is a good reason for a court of equity to refuse decreeing a specific performance of a contract for the sale of it.

40. *A.* being seised of a copyhold estate attempts to surrender it to the use of his will, with a resolution to devise it to *B.* his sister's son; but a surrender not being practicable, (by reason of some

some accidents,) he prevails upon his sister, who was his heir at law, to give a bond conditioned to surrender at her son's request upon payment of 200*l.* *A.* dies; *B.* receives the rents and profits some time, and then dies intestate, leaving only two sisters. The mother administers, and having procured herself to be admitted tenant to the copyhold, &c. devises it by will to one of her daughters, and sister of *B.* The other brings her bill against the devisee for a specific performance of the condition of the bond, by which she would be entitled to a moiety of the land. Decreed that the mother should be considered as a trustee for *B.* her son, and that a surrender and conveyance should be made accordingly, upon payment of the 200*l.* with interest from the death of *A.*

41. Plaintiff sold defendant a copyhold estate of 16*l.* *per ann.* value (on which was timber of 150*l.* value) for 630*l.*, and covenanted to surrender on or before *Michaelmas* then next. Defendant paid 10*l.* earnest, entered on the premises and cut down timber, stocked the land, and acted as owner. On a bill for a specific performance of covenants, plaintiff proved he gave notice that he would surrender next court day, which does not appear to have been before *Michaelmas*, and attended accordingly. On defendant's part it was proved, that he was disordered in his senses; and though there be proof of the timber's value, yet, as no custom is alleged of the tenants having power to cut it down, it must be according to the common law by which the tenant has no power over it, and therefore a plain imposition. Lord Chancellor was of opinion, that it was a great over-value, and that his cutting down timber was a proof of his folly, being a direct forfeiture; but said it is a matter merely at law. If the surrender had been, an action would have lain at law. Bill dismissed.

42. *A.* and *B.* enter into articles for the purchase of part of *A.*'s estate. *A.* dies before a conveyance is made, and his executors pay away the personal assets in discharge of specialty debts which were a lien on the real estate. A specific performance of these articles decreed, for that the sale of the estate, in consideration of the purchase-money, was a specific lien on the lands by the constant course of the court, and for so much of the purchase-money as the lands fall short to answer *B.*, he shall come in as a specialty creditor.

Eq. 142. 1 Powell on Contracts, 314. 2 Fonbl. Eq. 37. Gage v. Acton, Com. Rep. 67. Acton v. Pierce, 2 Vern. 480. Dale v. Smithwick, 2 Vern. 151. Cannel v. Buckle, 2 P. Wms. 243. Watkins v. Watkins, 2 Atk. 97. Beard v. Beard, 3 Atk. 72.

Bonds have been considered in equity as evidences of agreements, and the obligors have been held to a specific performance, and not allowed to forfeit the penalty. Ld. Raym. 683. 2 Vern. 24. 540. 595. 2 P. Wms. 608. 3 P. Wms. 188. 3 Atk. 547.

Note; In 2 Eq. Abr. 22. pl. 21. this is stated to be the same as Allison's case, 9 Mod. 62.

6 Dec. 1714, cor. King, C. Edwards v. Heatter, Sol. Ca. in Ch. 3. 2 Eq. Abr. 23. pl. 23.

T. 1725, Canc. Charles & al. v. Andrews, 9 Mod. 152. 153. 2 Eq. Abr. 37. pl. 4. Vide 1 Vern. 455. 2 Vern. 273. 763. 2 Com. Dig. tit. Chancery (2 G. 4).

M. 1725, Canc.
Neve & al. v. K.ck,
 9 Mod. 106.
 2 Eq. Abr. 25. pl. 25. & n.
Vide 9 Mod. 62. Ch. Ca. 252.
 Com. Dig. tit. Chancery (2X.1).
Tooke v. Hastings, 2 Vern. 97.
Hobson v. Trevor, 2 P. Wms. 192.
Randal v. Randall, 2 P. Wms. 464.

M. 1725, cor. King, C.
Colt v. Netterville,
 2 P. Wms. 304.

H. 1726, cor. King, C.
Sikes v. Lister and another,
 5 Vin. Abr. 541. pl. 28.
 2 Eq. Abr. 25. pl. 28.

16 Nov. 1725, Canc.
Dr. Bettejworth v. Dean and
Chapter of St. Paul's,
 Sel. Ca. in Ch. 66.
 2 Eq. Abr. 26. pl. 30. Gro.
 & Rud. of Law & Eq. 254.

H. 1727, cor. King, C.
Marcbierefs of Anandale v. Harris,
 2 P. Wms. 433.
 1 Eq. Abr. 87. pl. 6.
Affirmed in Dom. Proc.
 3 Bro. P. C. 445.
Vide Cray v. Rooke, Ca. Temp.
 Talb. 153. *Clarke v. Periam,*
 2 Atk. 333. 337. *Priest v. Parrott,* 2 Vef. 160.

13 May 1728, Dom. Proc.
Dr. Bettejworth and others v.
Dean and Chapter of St. Paul's,
 London, 3 Bro. P. C. 389.
 Sel. Ca. in Ch. 66.
 Gro. & Rud. of Law & Eq. 254.
 2 Eq. Abr. 26. c. 30.

M. 1728, cor. M. R.
Anon. Mos 37.

43. A. covenanted for himself and his heirs to surrender a copyhold estate to certain uses, and died before it was done. A bill was brought against their heir for a specific performance of the covenant, and a surrender was decreed accordingly.

44. On a bill to compel performance of an agreement for transferring 5000*l.* *York-Buildings* stock at 7*l.* 5*s.* per cent. Defendant demurred, but demurrer over-ruled; for the case might be attended with such circumstances as would make it just to decree a specific performance of the parties own agreement, or at least to pay the difference.

45. Bill for the execution of articles for the sale of lands against the executors and devisees of the land for life, and the infant heir of the vendor. Decreed that the articles be carried into execution, and plaintiff S., upon paying the purchase-money to the executors, to be let into possession at *Lady-day* next, and the executors and devisees to make a conveyance to plaintiff at his cost, and plaintiff to hold the premises against the infant heir, who, when of age, was to convey to plaintiff and his heirs, unless he shews cause to the contrary within six months after he comes of age.

46. The reason why specific performances are decreed in Chancery, is because the lien is subsisting at law, and the law can only give damages which may not be adequate.

3 Bro. P. C. 389. *Vide* post, pl. 48. S. C.

47. A man having seduced an innocent woman, by whom he had a bastard, gives her a writing, obliging himself to pay 2000*l.* after his death for the purchasing an annuity for the woman and child for their lives. The man dies, equity will compel a performance of the agreement.

48. Where an equal agreement cannot, by reason of a subsequent act of parliament, or some other lawful impediment, be performed in the whole, yet the same shall be specifically executed in such part of it as remains lawful.

49. A bond, conditioned to convey lands for money received, is considered in equity as articles, and the condition shall be performed in specie.

The

The obligee having been in possession twenty years need not prove the money paid.

50. Articles by a guardian for sale of timber have been carried into execution by a court of equity.

M. 1729, cor. King, C.
Clavering v. Clavering, *Msf.* 224.
Vide *Mafon v. Mafon*.

51. Covenant, in consideration of marriage, to settle lands of 350*l.* per ann. on husband and wife, and the issue male of the marriage, remainder to the brothers of the husband. Equity will compel a specific execution of this covenant, and not put the party to an action of covenant in the trustee's name.

T. 1730, cor. King, C.
Vernon, Esq. and others v. Vernon, Widow and Executrix,
2 P. Wms. 594. *Kel. in Cb.* 9.
2 *Eq. Abr.* 28. pl. 33.
Affirmed in Dom. Proc.
4 Bro. P. C. 26.
Vide *Osgood v. Strode*,
2 P. Wms. 245. *Goring v. Nash*,
3 Atk. 186. *Stephens v. Truman*, 1 Vef. 73.

52. Bill for a specific performance of an agreement comprised in the condition of an obligation.

J. S. the plaintiff's father had five houses in B. in right of his first wife, and after her death he takes a second wife, by whom he had issue the defendant, and then purchases two other houses in B. Afterwards, upon an intended marriage between plaintiff and one E., the plaintiff entered into an obligation of 200*l.* to his father, the condition of which run thus: "Whereas J. S. the obligee had given all his houses in B. to the heirs of the body of plaintiff for ever, by his will, of such a date;" and here breaks off, and did not state what sum the plaintiff was to pay in defeazance of the obligation. The defendant was made executor and residuary legatee to J. S.: the will mentioned in the obligation was not to be seen; and it was proved in the cause, that J. S. never intended more for the plaintiff than the five houses he possessed in right of his mother, that he had settled the two other houses on the defendant, and that plaintiff had declared he was well assured his father never intended him more than the five houses; but still he would take advantage of the scrivener's mistake in the obligation. But the court dismissed the bill, as against reason and equity that the plaintiff should take advantage of this mistake against the true intent and disposition the party meant to make of his estate.

H. 1730, cor. King, C.
Hunburn v. Curtis, *Fitzgib.* 113.

53. A. devised 8000*l.* to be laid out in land and settled to the use of B. in tail, remainder to C. in fee. B. and C. agreed by articles to divide the money. B. died without issue before a division of the money. A specific execution of the articles

P. 1733, cor. Talb. C.
Carter v. Carter,
Ca. temp. Talb. 271. 273. 274.
2 *Eq. Abr.* 20. pl. 38.
The reporter says, Lord Talbot laid much stress on tenant in tail's dying without issue.

decreed at the Rolls in favour of B.'s executor, and afterwards affirmed by Lord Talbot.

T. 1733, cor. Jekyll, M. R.
Hall v. Hardy,
3 P. Wms. 187. 189, 190.
2 Eq. Abr. 28. pl. 35.

54. A bill lies to compel a specific performance of an award where the party submitting has received the money, in consideration whereof he is to convey the estate sued for; and the court will give costs, being a defence against conscience for the defendant to take the money awarded, and yet refuse to perform his part of the award.

S. C. Where the husband, for a valuable consideration, covenants that his wife shall join with him in a fine, the court will enforce a performance of such a covenant.

Quere. If it appears impossible for the husband to procure the concurrence of the wife? for in all these cases it is to be presumed that the husband has gained the wife's consent before he covenants.

S. C. Difference between awards to pay money and to do any thing collateral, and why a bill in equity may be proper only to compel a specific performance of the latter?

3 P. Wms. 189. N.
T. 1723, cor. M. R.
Winter v. Devreux.
Vide Barrington v. Horn, 2 Eq.
Abr. 17. pl. 7. S. P. Orsted v.
Round, ante, pl. 27. S. P.
See more, *post*, tit. Fines.

P. 1734, cor. Talbot, C.
Johnson v. Ogilby & al.,
3 P. Wms. 279.
2 Eq. Abr. 31. pl. 39.
Note; In cases of fraud, equity
has a concurrent jurisdiction with
the courts of law.

55. A bill in equity lies not to compel a specific performance of an agreement to pay money in consideration of having stifled a prosecution for felony. *Secus* if to stop a prosecution at law for a fraud.

25 Mar. 1736, Dom. Proc.
Scrope v. Ux. v. Offley,
4 Bro. P. C. 237.

56. A man makes his son by the first wife agree to a provision for a second wife, and the issue of that marriage. This provision being in the son's own wrong, and he being at this time ignorant of his right, the agreement is a fraud upon him, and he shall not be held to a performance of it.

31 Jan. 1737, cor. Hardw. C.
Gibson v. Patterson & al.,
1 Atk. 12.

57. Although a vendor of an estate does not produce his deeds, or tender a conveyance *within the time limited* by the articles of purchase, the court does not regard this neglect, but will decree a sale notwithstanding; and if the plaintiff can make out a good title, then defendant to pay costs.

28 Jan. 1739, cor. Hardw. C.
Lyddal v. Weston, 2 Atk. 20.

58. The court of Chancery, in carrying agreements into execution, govern themselves by a moral, not by a mathematical certainty of a good title, which is impossible in the nature of things.

2 Aug. 1739, cor. Hardw. C.
Stapilton v. Stapilton & al.,
1 Atk. 2 to 10.
Vide Eq. Abr. 16.

59. A court of equity is very desirous of laying hold of any just grounds to carry agreements into execution where entered into to establish the peace
or

or save the honour of a family; and where they are reasonable ones, the court will if possible decree a performance. Atk. 207. pl. 164. 371. pl. 242.
3 Atk. 383. pl. 127. 385. 386.

S. C. An infant may have a decree upon any matter arising on the state of his case, though not particularly within an agreement, or prayed by his bill.

S. C. Where there is an agreement to suffer a recovery, and uses are declared, though it is suffered at a different time from the recovery covenanted to be suffered, yet if no subsequent declaration of uses, it will enure to the uses so declared.

S. C. Where there is a deed to lead the uses of a recovery, it is not in the power of tenant in tail alone to declare new uses; but such subsequent declaration must be by all the parties concerned in interest.

S. C. The expression in the Countess of Rutland's case, 5 Co. 25., that *whilst it is directory only* new uses may be declared, means, that as the uses must arise out of the agreement of the parties, they, by mutual consent, may change the uses.

S. C. Where a court of law or equity finds that the general and substantial intent of the parties was that the estate should pass, they will construe deeds in support of that intention different from the formal nature of those deeds themselves. *Vide* Jones v. Morley,
2 Salk. 677.

S. C. Where there is a recovery for strengthening the title of a purchaser, with a declaration of the uses to him and his heirs; notwithstanding a preceding one to different uses, it will not enure to make good such former declaration, but the uses of the purchase only.

S. C. If tenant in tail makes a lease not warranted by the stat. 32 H. 8. and suffers a recovery, it lets in the lease and makes it good: the like as to a judgment, statute, or bond.

S. C. The issue of tenant in tail by virtue of the stat. *de donis* may avoid a prior lease, charge, or estate, made by such tenant, but not by himself; but when by the recovery he has gained a fee, the issue being barred, all the reasoning for their avoiding estates, &c. made by him ceases.

S. C. Where a tenant in tail suffers a recovery, he by construction of law is in of the old use, and the estate is discharged of the stat. *de donis*. *Vide* Lord Derwentwater's case,
2 Mod. 172.

S. C. Where there is a valuable consideration for an agreement on all sides, there is sufficient ground to come into a court of equity; but a mere volunteer

Vide Cann v. Cann,
1 P. Wms. 726, 7.

Lord Hardwicke said, this had been the rule since the case of Colwell and Shadwell.

T. 1739, cor. Hardw. C.
Gunter v. Halfey, Amb. 586.
1 Eq. Abr. 19.
Vide Hawkins v. Holmes,
1 P. Wms. 770. Prec. in Ch.
208. 374. *Wanley v. Saw-*
bridge, in Scacc. 4 Geo. 2.
Bro. P. C. 45. *Brownford v. Edwards*, 2 Vef. 246. *Foxgrave v. Litter*.

30 Dec. 1740, cor. Hardw. C.
Walker v. Walker, 2 Atk. 100.

30 Mar. 1741, Dom. Proc.
E. of Anglesey v. Annestey,
4 Bro. P. C. 421.

T. 1741, cor. Hardw. C.
Perkins v. Thornton, Amb. 502.
Vide Barker v. Barker,
May 1765.

16 July 1741, cor. Hardw. C.
Bates v. Dandy, 2 Atk. 207.

volunteer is not entitled to come there for an execution of an agreement.

S. C. An agreement upon a supposition of a right, or a doubtful right, though it may afterwards come out on the other side, is binding; and the right shall not prevail against the agreement of the parties.

S. C. But otherwise the constant rule of the court is to order the money to be laid out in land, to give the remainder-man his chance.

60. Specific performance of a parol agreement will be decreed, if it is admitted in the answer, or if material and unequivocal acts are done in part performance.

Attorney General v. Day, 1 Vef. 221. *Whaley v. Bagenal*,
Foxgrave v. Litter.

61. Where a part of the agreement is performed on one side, it is but common justice it should be carried into execution on the other.

62. If an agreement is in part performed by one of the parties, it is too late for the other to complain of fraud, surprise, &c. or attempt to set the agreement aside on that account, for a court of equity will decree a specific performance of the remaining part of it.

63. On marriage agreement to settle a jointure in consideration of a portion to be paid by the wife's father, though the portion was not paid, the settlement was decreed to be performed.

64. J. D. who died intestate left three sisters; his personal estate being agreed to be divided into thirds; two mortgages, the one in fee, the other for a term, each for 150*l.*, were allotted to the defendant, one of the sisters; before any assignment her husband borrowed 200*l.* of the plaintiff upon note; and as a further security left the two mortgages with him, and gave his note, promising to assign them, and then dies. Bill brought against his administrator and against the mortgagors to be paid principal and interest, or to foreclose.—Lord Hardwicke held, that the husband's promise to procure an assignment of the mortgages, amounted in equity to a disposition of them pro tanto, so as to satisfy the plaintiff's debt; which being done, they belong to the wife as her choses in action.

65. Where

65. Where a person undertakes to make out the title of another to an estate, and is to have a part of the lands as a satisfaction for his trouble, though the agreement for this purpose is artfully drawn, in order to keep it out of the statutes of champerty, he will not be entitled to have a specific performance decreed here, but will be left to his remedy at law.

1 Dec. 1741, cor. Hardw. C.
Powell v. Knowler, 2 Atk. 224.
Vide Wyat v. Slater.

66. If a father who is possessed of an advowson, which he apparently designed for his son, be prevailed on when in an infirm state of mind to enter into articles for the sale of it to another person, a court of equity will not compel a specific performance, although there is no imposition of fraud imputable to the purchaser.

P. 1742, cor. Hardw. C.
Bell v. Howard and others,
9 Mod. 302.
Vide 1 Ves. 155. 1 Bro.
Ch. Ca. 95. Buxton v. Lister,
3 Atk. 383. Savage v. Taylor,
Ca. T. Talb. 234. Goring v.
Nash, 3 Atk. 180.

a person of a weak mind, vide White v. Small, 2 Ch. Ca. 103. Clark v. Hanway, 2 P. Wms. 203. James v. Greaves, 2 P. Wms. 270. Evans v. Blood, 4 Bro. P. C. 557. Bennett v. Vade, 9 Mod. 312. and 2 Atk. 324.

In what cases equity will set aside a conveyance obtained from

67. A proviso in articles for the purchase of an estate, that if either should break the agreement, he should pay 100*l.* to the other. The defendant on being offered two years purchase more, accepted it, notwithstanding his agreement.—*Lord Hardwicke decreed a specific performance of the articles.*

21 July 1742, cor. Hardw. C.
Howard v. Hopkyns, 2 Atk. 371.

S. C. The offering to pay the stipulated sum will not vacate the agreement; for it is no more than the common case of a penalty.

S. C. A penalty has never been held to release parties from their agreement; for though incurred, they must perform it notwithstanding.

68. If parties are entering into an agreement, and the will out of which a forfeiture arose was lying before them, and their counsel, while the drafts were preparing, the parties shall be supposed to be acquainted with the consequence of law as to this point.

8 Jan. 1743, cor. Hardw. C.
Pullen v. Ready, et 2 contra,
2 Atk. 591.

S. C. After an agreement has entirely settled all disputes between parties and their several rights, the hands of the court are so tied up they will not enter into a question which might have been started had there been no such agreement.

69. *H.* in her lifetime agreed with *M.* to convey to him her interest in a life-estate for 300*l.*, to be paid at three instalments, and two of 100*l.* were paid by *M.* accordingly; but before the third payment an accident happening, which made the thing more valuable, and *H.* insisting on an advance, *M.* agreed to give 140*l.* more, but *H.* dying

9 Nov. 1747, cor. Hardw. C.
Lacon v. Martins, 3 Atk. 1.

ing soon after, nothing further was done, nor the conveyance executed. Lord *Hardwicke* decreed the agreement to be carried into execution in favour of the administrator of each against *M.*, and the heir at law of *H.*

S.C. Delivery of possession or payment of money is part performance of an agreement not reduced into writing.

22 O&A. 1744, cor. *Hardw. C.*
Goring v. Nash and others,
3 Atk. 186.

70. By articles between Sir *R. F.* and *J. F.* his son, previous to the marriage of the latter, an estate of 820*l. per annum* was limited to the son for life, and after the determination of that estate, to raise a jointure of 400*l. per annum* rent-charge for the wife, and then to trustees to preserve contingent remainders to the sons in tail male, and afterwards to sons by another marriage, and there is no other limitation; then the articles take up the consideration of another part of the estate, and limit the uses there to the same persons as in the first-mentioned lands, with a charge by way of additional portion of 4000*l.* to the daughters of Sir *R. F.* the father; and after limitations to the plaintiff Lady *Goring*, one of the daughters of Sir *R. F.*, and her heirs male, unless Sir *R. F.* should appoint other uses under his hand and seal, then to his other daughters in tail, then to *J. F.*, then to the right heirs of Sir *R. F.*—The father died in 1736, the son survived, who directed a draft to be prepared for carrying the articles into execution, but died before it was finished, the legal estate in some of the lands descended to the four sisters in fee, as heirs both of father and brother. A bill brought by Lady *Goring* to carry the articles into execution, and to have the entail of the estate limited to her settled accordingly.—The articles made previous to the marriage of *J. F.* decreed to be carried into execution for the benefit of the plaintiff his eldest sister.

Vide Jenkins v. Keymis,
3 Lev. 150. 237, 238. and
1 Ch. Ca. 103.

The specific execution of the articles being the most adequate justice in general, the court will not leave it to an action at law.

Though it is discretionary in the court whether they will decree a specific execution, yet it is so on certain grounds, and not arbitrary, but governed by the rules of equity.

Vide Finch v. Lord Winchelsea,
1 P. Wms. 277.
Holt v. Holt, 2 P. Wms. 648.

In a question between relations in the same degree, the rule that governs the court in these cases is, whether it would be attended with hardship or not? Or whether a superior or inferior equity arises

arises on the part of the person who comes for a specific performance?

A specific performance of marriage articles has been decreed in the court of Chancery even as to collaterals.

The court will not decree a partial performance of articles, but where some parts appear unreasonable, they always dismiss the bill.

In cases of fraud or mistake, the court goes upon another ground, and relieve against the settlement itself.

71. In general the court of Chancery will not entertain a bill for a specific performance of contracts for chattels, or which relate to merchandise, but leave it to law, where the remedy is much more expeditious; but in the present case the agreement not being final, but to be made complete by subsequent acts, a bill to carry it into execution was allowed.

S. C. The court ought to weigh with great nicety cases of this kind, before they determine the bill proper, where it is a mere personal chattel.

S. C. Every agreement of this sort ought to be *certain, fair, and just* in all its parts, or the court of Chancery will not decree a specific performance.

72. It is in the discretion of the court whether they will decree a specific performance, or leave the plaintiff to his remedy at law.

73. Where an agreement has been reduced to a certainty, and the substance of the statute of frauds complied with in the material part, the forms have never been insisted upon.

S. C. Where there is a complete agreement in writing, and the person who is a party and knows the contents, subscribes it as a witness only, she is bound by it, for it is a signing within the statute.

ference betwixt the two cases was, that the writing there, though all in the father's hand, was only a sketch of an agreement, not settled or confirmed by the parties, but here the defendants signed it as a complete agreement, and, as she knew the contents, is to be bound by it in the present case.

74. An agreement not signed by one party, is binding on him where acquiesced in and acted upon, for it is the agreement of all.

75. An agreement of which there should be a specific performance, ought to be in writing certain and fair in all its parts, and for adequate consideration.

Vide Vernon v. Vernon,
2 P. Wms. 594.

15 July 1748, cor. Hardw. C.

Buxton v. Lister and another,

3 Atk. 383, 385, 386.

Sir Joseph Jekyll, in Cud and Rutter, 1 P. Wms. 570. decreed a specific performance in the case of a chattel, but Lord Parker reversed it; and it has been ever since the constant rule not to retain such a bill.

29 Oct. 1746, cor. Hardw. C.

Joyne v. Statham, 3 Atk. 389.

23d May 1747, cor. Hardw. C.

Welford v. Beaulieu,

3 Atk. 503, 504.

Lord Hardwicke, in this case, denied the general doctrine as laid down in *Bawdes v. Amhurst*, Prec. in Ch. 402., though true as applied to that case by Lord Cowper; and said the difference betwixt the two cases was, that the writing there, though all in the father's hand, was only a sketch of an agreement, not settled or confirmed by the parties, but here the defendants signed it as a complete agreement, and, as she knew the contents, is to be bound by it in the present case.

1 Feb. 1748, cor. Hardw. C.

Owen v. Davies, 1 Ves. 82.

11 July 1749, cor. Hardw. C.

Underwood v. Hitchcock,

1 Ves. 279.

Vide ante, pl. 71.

22 June 1749, cor. Hardw. C.
Whitmel v. Farrel, 1 Ves. 257.

76. A husband covenants in marriage articles, in six months after the death of his mother, and that he should come to and be in possession of the estate, in jointure to settle 100 *l. per ann.* for every 1000 *l.* upon his wife for life, remainder to the issue of the marriage, remainder to his heirs. He died in the lifetime of his mother, leaving no issue. The estate reverts to his heir, who shall not be compelled by his wife to a specific performance.

23 Mar. 1751, cor. Hardw. C.
Matbould v. Walbank,
 2 Ves. 238.
Vide 23 H. 6. c. 10.

77. Bill filed to carry into execution an agreement for the assignment of the fees and profits of the office of keeping *Bridewell*, and of the profits of the tap-house. Dismissed.

24 July 1755, cor. Hardw. C.
Hinton v. Hinton, *Amb.* 277.
 1 *Eq. Abr.* 70.

In this case Lord Hardwicke denied the authority of *Mufgrave & Dashwood*, 2 Vern. 45. 63. but his lordship's reasoning seemed to be against the sentiments of the bar.

78. A copyholder for lives where there was a customary right for the widow to enjoy for life the whole estate of which her husband died seised, articulated for the sale of his estate for a valuable consideration, but died before the surrender. The widow contended her free-bench was not bound by the articles. *Per Lord Hardwicke*—Where there is an agreement for the sale of a copyhold estate, the court will decree a performance against the assignees of a bankrupt, and against an heir at law; so in strong equity the widow should be bound.

S. C. 2 Ves. 634.

Agreements are not carried into execution against issue in tail, or remainder claiming *per formam doni*.

1765, cor. M. R.
Daniel v. Adams, *Amb.* 495.
Vide *Drury v. Drury*.
Baker v. Child, 2 Vern. 62.
Barrington v. Horn, M. 1 G. 2.
Hall v. Hardy, 3 P. Wms. 187.

79. Husband and wife having joint power over the wife's estate, empower an agent to sell part of it *by auction*. He articles to sell it, *by private contract*, for more than the price required. The husband had written a letter to the agent, in which he only desired his wife's compliments, that is no proof of her joining in giving an authority to the agent, and the buyer shall not compel a specific performance.

14 June 1774, Dom. Proc.
Pope v. Roots & al.
 7 Bro. P. C. 184.
 Mr. Cox, in his note to *White v. Nutt*, 1 P. Wms. 62. says that Lord Apsley, in this case, questioned the statement of *Cass* and *Rudele*, 1 Vern. 280.; but nothing of that kind appears in Bro. P. C.

80. *J. S.* agrees to sell his estate for his life. The time limited for the conveyance was the 31st of *October*; but the annuity was to commence, and *A.* was to have the rents and profits of the estate, from the 5th of *April* preceding. *J. S.* died on the 12th of *November*, before any conveyance was executed. On a bill brought by *A.* for a specific performance of this agreement, the court dismissed it, but without costs.

81. Sale of an estate for a certain sum of money, and an annuity for life, the agreement being fair, a court of equity will decree a specific performance, although the party die before any payment of the annuity.

bargain depends on a contingent event, which chance both parties know, if the event turns out against one of the parties, he must be discharged from his contract.

T. 1782, cor. Thurlow, C.
Mortimer v. Copper,
1 Bro. Cb. Ca. 156.
1 Eq. Abr. 18.

Note; Lord Chancellor said, that to decree otherwise would be to lay down a rule that where a

82. *B.* treats with *A.* for a piece of land, having an intention to build a mill, to which the consent of a corporation is necessary; but *A.* refuses to treat on condition; *B.* fails in obtaining consent; this failure in his speculation, is no defence against a bill for specific performance.

P. 1784, cor. Thurlow, C.
Adams v. Weare,
1 Bro. Cb. Ca. 367.
1 Eq. Abr. 18.

83. Bill for specific performance against vendor, the vendee being in possession, and an account being necessary of the vendee's personal estate, referred to the Master to fix a short day for the payment of the purchase-money, otherwise the bill to be dismissed (*quoad hoc*) with costs.

24 July 1784, cor. Thurlow, C.
Sir James Lowther v. Lady Andover and others,
1 Bro. Cb. Ca. 396.

84. Specific performance not decreed, where there is a concealment of an outgoing on the part of the vendor.

P. 1785, cor. Thurlow, C.
Shirley v. Stratton,
1 Bro. Cb. Ca. 440.
1 Eq. Abr. 18.

85. Contract for purchase in lots. No title can be made to two of the lots, and others had been deteriorated: if the former were not so blended with the others as to injure them, a specific performance shall be decreed.

T. 1786, cor. M. R. abf. C.
Poole v. Sbergold,
2 Bro. Cb. Ca. 118.

86. Promise by a letter to renew a lease, in consideration of money already laid out by the tenant, is *nudum pactum*, and no specific performance will be decreed; nor is it varied by money having been laid out afterwards: but if previous to the promise defendant had signified his intention to lay out money, and on that consideration the promise had been made, specific performance would be decreed.

M. 1786, cor. Thurlow, C.
Robertson v. St. John,
2 Bro. Cb. Ca. 140.
1 Eq. Abr. 18.

87. At a sale by auction the seller's agent bid for the purchaser, a specific performance refused.

P. 1788, cor. M. R. abf. C.
Twining v. Morrison,
Taggart v. Twining and another,
2 Bro. Cb. Ca. 326. Vide *Benwell v. Christie*, Cowp. 395.

88. Small deviations from a plan agreed upon for building not material, otherwise if obstinate or corrupt.

M. 1789, cor. Thurlow, C.
Craven v. Tickell, 1 Ves. jun. 60.

89. Where the plaintiff had received a promissory note without a stamp, the court directed a proper

P. 1792, in Scacc.
Aylett v. Bennett, 1 Anst. 45.

till the expiration of the old; and so it was decreed, parol evidence being refused.

2 Atk. 98. Jones v. Statham, 3 Atk. 388. Reech v. Kennegal, 1 Vef. 123. 1 Wils. 227. Amb. 67. Barrow v. Greenough, 3 Vef. jun. 152.

Secondly, Where the agreement has been in part performed. *Vide* Floyd v. Buckland, 2 Freem. 168. Butcher v. Stapely, 1 Vern. 363. Pyke v. Williams, 2 Vern. 455. Lockey v. Lockey, Prec. in Ch. 519. Foxcraft v. Litter, Prec. in Ch. 526. Binfield v. Coleman, Borrett v. Gomeserra, Bunb. 65. 94. Pengal v. Ross, 2 Eq. Abr. 46. pl. 12. Earl of Aylesford's case, 2 Stra. 783. Clerk v. Wright, 1 Atk. 12. Lacon v. Mertins, 3 Atk. 1. Owen v. Davies, Attorney-General v. Day, Taylor v. Beech, Potter v. Potter, 1 Vef. 82. 218. 297—437. Gunter v. Halfey, Amb. 586. Whaley v. Bagenal, 6 Bro. P. C. 45. Whitbread v. Brockhurst, 1 Bro. Ch. Ca. 404. Denton v. Stuart, cited 1 Vef. jun. 329. 1 Fonb. Tr. Eq. 165. 175. Whitchurch v. Bevis, 2 Bro. Ch. Ca. 559. Redding v. Wilkes, 3 Bro. Ch. Ca. 400. Several other cases are collected, 5 Vin. tit. Contract.

It is now established, that if the defendant has concurred in a material unequivocal act by which he has obtained a substantial part of his object, as taking possession or accepting a considerable part of purchase-money, he shall not be allowed to retract, and the plaintiff's right to a full execution of the contract has attached; but acts merely ancillary and introductory, as preparing conveyances, making surveys, valuations, &c. though attended with some expence to the plaintiff, will not sustain an agreement upon the ground of part performance. Acceptance of a trifling earnest would probably not be deemed sufficient. As binding the parties, it is not the mode prescribed by the statute; and as a part performance, it is too inconsiderable in value. This, however, appears doubtful. *Vide* Simmons v. Cornelius, 1 Ch. Rep. 202. Voll v. Smith, 3 Ch. Rep. 36. Anon: 2 Freem. 128. Seagood v. Meale, Prec. in Ch. 560.

A third exception in equity, Where the answer admits an agreement, has prevailed to bind the defendant by that admission. *Vide* Croyfton v. Banes, Symondson v. Tweed, Prec. in Ch. 208. 374. In Mortimer v. Orchard, 2 Vef. jun. 243. as there was a part performance, evidence was received of the terms of the agreement; but it has never been pretended that the admission of an agreement authorises the plaintiff to give evidence of the terms.

The frauds against which the statute is directed are those of setting up fictitious contracts and wills, and supporting them by perjury; though the statute could not be intended to countenance fraud or perjury, a temptation to perjury is held out to the defendant, who may be released by his own oath from an agreement, which, if not denied by his answer, may be enforced against him, but which the plaintiff is not permitted to support by evidence. The relief sought is in opposition to the statute, which is to prevent, by a general rule, mischiefs arising from loose contracts, and not to give way to particular instances of hardship. The principal cases on this subject are Child v. Lord Godolphin, cor. Macclesfield, C. Whaley v. Bagenal, 6 Bro. P. C. 45. Whitbread v. Brockhurst, 1 Bro. Ch. Ca. 404. and Whitchurch v. Bevis, 2 Bro. Ch. Ca. 559. The result seems to be that the statute may be used as a bar to the discovery.

The efficacy of the statute has been farther restrained by Goman v. Salisbury, 1 Vern. 240. 5 Vin. 523. pl. 38. and Legal v. Miller, 2 Vef. 299. In the first case it was held that a written agreement, made since the statute, might be discharged by parol; and the bill for specific performance was dismissed. In each of the two last cases, an agreement executed according to the statute was discharged by a subsequent parol agreement, of which evidence was given on the ground of part performance; for this purpose the evidence must prove a distinct, subsequent, independent agreement; for, except in a case of direct fraud, evidence of what passed before or at the time of the transaction cannot be received to contradict or vary an agreement conformable to the statute, or to introduce any new term. *Vide* Binfield v. Coleman, Bunb. 65. Lord Irnham v. Child, 1 Bro. Ch. Ca. 92. Hare v. Shearwood, 3 Bro. Ch. Ca. 168. 1 Vef. jun. 241. Brodie v. St. Paul, 1 Vef. jun. 316. Jordan v. Sawkins, 3 Bro. Ch. Ca. 388. 1 Vef. jun. 402. Rich v. Jackson, 4 Bro. Ch. Ca. 514. and Rosamond v. Lord Melington; in which Lord Kenyon, when M. R. refused parol evidence that an annuity was to be redeemable.

See Observations on the Statute of Frauds, 1 Fonb. Tr. Eq. 168. (n. d), 171. (n. e).

In Forster v. Hall, 3 Vef. jun. 712. Sir P. Arden, M. R. thought the court had gone too far in taking cases out of the statute of frauds on the ground of part performance of an agreement. The relief should have been confined to compensation.

98. Bill for specific performance of an agreement to grant a lease to the plaintiff would, on evidence of his fraud, misrepresentation, and insolvency, have been dismissed with costs, if not compromised.

25 & 27 June 1796, cor. M. R.

Willingham v. Joyce,

3 Vef. jun. 168, 169.

The cases in which evidence has been admitted upon agreements within the statute of frauds, and in support of a bill for specific performance, are collected in a note to Pym v. Blackburn.

S. C. The court would not execute an agreement to grant a lease to a man who had committed felony.

7 July 1796, cor. Loughb. C.
Moseley v. Virgin,
3 *Ves. jun.* 184.

99. Specific performance of an agreement to build may be decreed if sufficiently certain, but a general covenant to lay out a certain sum in a building of a certain value cannot be so executed.

S. C. Though a formal mistake in a deed may be rectified by articles of which it purports to be an execution, essential additions cannot be made to a conveyance from articles of which it does not purport to be an execution; nor can the transaction be rescinded by the court.

14 Mar. 1798, cor. Sir P. Arden,
M. R.

Raton v. Lyon, 3 *Ves. jun.* 690.
Vide Bayley v. Leominster Corporation, 3 Bro. Ch. Ca. 521.
1 *Ves. jun.* 476. on the principles of which his Honour decides this case.

100. The construction of covenants is the same in equity as at law; but equity will relieve against a strict performance upon equitable circumstances, and no wilful default.

S. C. A legal instrument is not to be construed by the acts of the parties.

See more under next Section, and also under
Landlord and Tenant, Money, Purchase, Sale, Stock.

Sec. 4. What shall be said a sufficient Performance, or shall go in Satisfaction of the Whole or a Part of an Agreement.

M. 1681, Cane.
Dradly v. Deacon,
2 *Vern.* 242.
1 *Eq. Abr.* 373. pl. 5.

1. **S**ubsequent agreement with *A.*, by a factor of a merchant for freight at 6*l.* 10*s.* per ton, good, though *A.* took no notice he had made a former agreement with the merchant at 3*l.* 10*s.* per ton, that agreement having been obstructed by an embargo.

M. 1682, cor. Finch, C.
Berrisford v. Done,
1 *Vern.* 98, 99.
1 *Eq. Abr.* 85. pl. 2.
Vide Morris v. McCulloch,
Amb. 432.

2. *A.*, an officer in the army, agrees to surrender his commission to *B.* for 100*l.*, for which *B.* gives bond to *A.* *A.* surrenders, but *B.* is refused to be admitted. No relief against this bond, *save only against interest and costs.*

M. 1683, cor. North, C. S.
Sewell v. Masson,
1 *Eq. Abr.* 28. 1 *Vern.* 210.
pl. 3. 147. pl. 11.
Vide 1 Ch. Ca. 110. *Cujus est dare, ejus est disponere.*

3. Where a creditor agrees to accept a lesser sum in satisfaction of a greater, the agreement ought to be precisely performed.

4. The

4. The husband, by articles before marriage, covenants to add 500*l.* to his wife's portion of 500*l.*, and that it should be laid out in land, and settled on the wife and the issue of the marriage. The husband, without the trustees consent, lays out the money in a fine house, garden, and farm. Allowed a sufficient performance of the covenant.

M. 1685, cor. Jeffries, C.
Tunbridge v. Teatber,
 1 Vern. 345.

5. By marriage articles it was covenanted, that the intended husband, if his wife survived him, should secure to her-half her fortune, to be at her disposal. The husband never altered the nature of the securities, but by his will gave his wife more than she could claim under the marriage agreement; the rest he disposed of in other legacies, and died. *Per cur.*—The legacy to the wife shall be taken to be in pursuance of the agreement, and shall discharge it; but if it be more beneficial to the wife to claim under the agreement than under the will, she shall have her election.

M. 1708, cor. Cowper, C.
Corus v. Farmer,
 2 Eq. Abr. 34. pl. 1.

6. *A.* married *B.*'s daughter. Before the marriage, *A.* and *B.* entered into an agreement contained in the conditions of two bonds. *A.* was to settle lands for a jointure on his wife and her heirs male by him. *B.* was to pay *A.* 800*l.* on a certain day as his daughter's portion: part of the principal was paid by *B.* and all the interest. *B.* by his will devises all his copyhold lands to *A.*'s wife, on condition she does not disturb his executors for the 800*l.*, and dies, leaving his wife executrix, who married *C.* the defendant. *A.* enjoys the copyhold estate; his wife dies, no settlement being made upon her: then *A.* dies, leaving issue a son only by the marriage, whom he makes executor. *A.*'s son sues *B.*'s executrix upon *B.*'s bond, and recovers; *B.*'s executrix sues *A.*'s son upon his father's bond, and recovers. *A.*'s son then brought his bill against the executrix, alleging, that a sufficient estate descended to him from the father, which was an equivalent performance of the settlement which his father had obliged him to make, and prayed relief against the proceedings at law. Lord Chancellor.—If *A.* had left any other son, the intent of the condition would be evaded by the son's leaving a daughter; but as he had not, it was an equitable performance: if there had been another son besides the plaintiff, he would have entailed the estate. Held also, that though *B.*'s devise of the copyhold to the wife was no bar to the husband's demand of the

P. 1707, cor. Cowper, C.
Bridges v. Beere,
 2 Eq. Abr. 34. pl. 2.

the 800*l.*, yet that should be taken in satisfaction of part of the 800*l.*

M. 1709, cor. Cowper, C.
Lord Pengall v. Rofs,
 2 *Eq. Abr.* 46. pl. 12.

7. *A.* agreed with *B.* to make him a lease for 21 years of land, rendering rent. *B.* paying *A.* 150*l.* fine, *B.* paid 100*l.* in part to *A.*'s agent, which *A.* knew of, and ordered his agent to prepare the lease; but before it was executed *A.* repented, and refused to grant the lease. *B.*, having paid 100*l.* earnest, exhibited his bill for a specific performance. *Per* Lord Chancellor—The payment of this 100*l.* is not such a performance of the agreement on one part as to decree an execution on the other; for the statute of frauds makes one sort of contracts, *viz.* personal contracts, good, if any money is paid in earnest. Now that statute says, that no agreement concerning lands shall be good, except it is reduced into writing; and therefore a parol agreement, as it is in this case, cannot be good within the statute by giving money in earnest: for there must be something more than a bare payment of money on the one part, to induce the court to decree a performance on the other part, either by putting it out of the party's power to undo the thing, or where it would be a prejudice to the party performing his part, as beginning to build, or letting the other into possession, &c. In such case, where the agreement hath proceeded so far on one part, the statute never intended to restrain this court from decreeing a performance of the other. But he would not put the plaintiff to his action to recover his 100*l.*, wherefore decreed it to be refunded.

T. 1714, cor. Harcourt, C.
Wilks v. Wilks,
 5 *Vin. Abr.* 293. pl. 39.
 2 *Eq. Abr.* 35. pl. 3.

8. A marriage agreement was contained in the condition of a bond, "that the husband should purchase lands of 800*l.* value, to be settled upon himself for life, remainder to his wife for life, remainder to the heirs male of the husband by the wife, remainder to the husband's right heirs." The eldest son of the marriage brings a bill against the father's executors to have the benefit of this agreement. Defendants insisted the father in his lifetime purchased a copyhold which descended to plaintiff, and likewise devised 100*l.* to plaintiff, to be raised out of land, and that these ought to be taken in satisfaction of the marriage agreement, especially as husband and wife were tenants in tail, and might bar the issue. *Per cur.*—Decreed plaintiff a satisfaction of the agreement in the bond, with interest at 4 *per cent.* from

from the father's death. — The copyhold estate descended to be taken in satisfaction *pro tanto*, but the 100*l.* legacy not to be taken in part. As to a conveyance of six acres, said to be made to plaintiff by the father, to inquire if voluntary, and then to go *pro tanto*; but if the purchase-money was paid to the father, then no part satisfaction.

9. A steward has a general authority to make contracts with the tenants, &c. but this will not bind the lord without his consent and approbation, or unless part of the bargain is actually executed.

P. 1717, cor. Cowper, C.
Anon. 5 Vin. Abr. 522. pl. 35.
2 Eq. Abr. 55. pl. 2.

10. One living in *Oxfordshire* covenants to purchase lands of 80*l.* a-year, to be settled, &c. The parties entitled desiring the money, were decreed to have twenty-four years purchase, the price lands bore in that county, and 80*l.* a-year for the time past, but not the interest of the purchase-money.

H. 1729, cor. M. R.
Badger v. Badger,
Mof. 117.
Vide 2 Vern. 551. 428.

11. On a marriage treaty between the defendants, 3000*l.* being the wife's fortune, and 3000*l.* more added to it by *William Chambers*, father of the defendant *John*, were invested in lottery annuities in the name of trustees; and thereupon by indenture, 18 July 1718, previous to the marriage, reciting that 6000*l.* was so invested in lottery annuities, it was agreed that the same should be turned into money, and laid out in a purchase of lands to be settled to the use of the defendant *John* for life, then to trustees during his life, to support, &c. then to *Elizabeth* the intended wife for her life, with remainder to trustees for two hundred years, remainder to the first and other sons successively in tail male, with remainder to *William Chambers* in fee; and it was thereby declared, that the two hundred years term was in trust, that in case the defendant *John* should have a son, and one or more other children, then the trustees after the death of *John* and *Elizabeth* should, by mortgage or sale, raise for younger children, if more than one, 2000*l.* between them, and interest at 5*l.* per cent. per ann. for their maintenance; and that till such purchase the trustees, with the consent of *John* and *Elizabeth*, should let the 6000*l.* continue in annuities, and pay the interest to such persons as would be entitled to the lands, and the trustees not to be answerable for more than they received, or for each other. And by the said indenture *William Chambers* covenanted, in consideration of the said marriage, to settle several

P. 1730, cor. King, C.
Chambers v. Chambers,
5 Vin. 513. pl. 16. Mof. 333.
1 Eq. Abr. 115. pl. 16.
2 Eq. Abr. 35. pl. 4. 224. pl. 7.
Fitzgib. 127. S. C.
And it is there said, these articles were not intended as a provision for the children of the marriage, (who were taken care of by another part of the articles,) but for the support of the husband, and as a farther advancement for him.
Vide 2 Vern. 670. 551. 702.

lands therein particularly mentioned to the use of himself for life, then to *John Chambers* in tail male, with remainder to himself in fee. The marriage took effect, the 6000*l.* was not laid out in a purchase; but in the year 1720, by consent of *John* and *Elizabeth*, and the trustees being in lottery annuities, was subscribed into the *South-Sea* Company, whereby a loss of about 3000*l.* happened. *William Chambers* was dead, having made no settlement of the lands specifically agreed to be settled; which therefore were descended to the defendant *John*, his son in fee. The defendants had issue the plaintiff their only son, and four daughters, who were likewise defendants. And this bill was brought to have the remainder of the 6000*l.* laid out in a purchase, and settled pursuant to the uses before mentioned; and the first question was, on whom the loss of the money subscribed into the *South-Sea* Company should fall? and as to that, it was agreed on all hands, that the trustees, having subscribed the lottery annuities into the *South-Sea* Company by consent of the defendants *John* and *Elizabeth*, were indemnified therein, not only by the terms and covenants in the settlement, but also by the act of parliament made in the year 1720, wherein every one's consent was involved, and whereby trustees were generally empowered to subscribe orders and annuities, &c. and therefore it was argued for the defendants the daughters, that the loss should fall wholly upon the son; that lands were of an uncertain value, and if lands had been purchased and they had afterwards increased never so much in value by discovering of mines, or otherwise, that the plaintiff the son would have had the whole benefit thereof, without any increase to the daughters of their portions; that in equity an agreement to purchase is considered as if a purchase were actually made; and therefore the loss ought to fall on the plaintiff, and the rather, for that if the stock itself had risen never so high, as it was expected it would and did rise to a very great price, the daughters could only have their 2000*l.*; and as the plaintiff was entitled to all the advantage in case of a rise, it was reasonable he should bear the loss now that a fall had happened, therefore the daughters ought not to be contributory to this loss. But on the other side it was argued and decreed, that the loss should fall in proportion on the daughters as well as the son; that the parties had

had an equal regard to the son as well as the daughters; that the son was to sustain the name of the family, and was to take first and more immediately than the daughters, whose portions came afterwards by way of charge only on the estate; that the construction contended for was to overthrow one part of the settlement, and that, if the loss had been a little more, the daughters must have had all, and the son nothing; that the parties have ascertained the proportion each were to have: and this is the measure the court ought to guide themselves by, and accordingly sent it to a Master to take the account, and to proportion the loss between the parties. The court further confirmed the settlement made by the father as a good execution of the agreement.

12. Plaintiff (by attorney by articles, dated November 1725) agreed to convey lands in C. to D. and his heirs before next Lady-day, and D. covenanted to pay him 1500*l*. D. lived till after Lady-day, but had in 1722 made his will, by which he devised all his real estate to his son R. for life, remainder to R.'s eldest son J. for life, remainder to his first, &c. son in tail male, with several remainders over, and thereby bequeathed all his personal estate to trustees to be invested in land, and settled as above; and dying soon after Lady-day 1726, R., his eldest son and heir, claimed the lands as descending to him, and made his will, and by express words he devised the premises thus articulated to be purchased to trustees to pay his debts, &c. and died, leaving said J. his son and heir, to whom D. had devised all his estate expectant on the death of R. D.'s will being made prior to the articles for this purchase, before he had any equitable interest in the lands, and consequently when he had no kind of title, he could devise nothing, so that this interest in the premises gained by D.'s articles must have descended to his son R. as heir at law, who might well devise the same; and though it may at first look strange, that when D. devised all his real and personal estate these words should not carry all, yet it will not seem so when it is considered that an estate purchased after the will cannot pass thereby, and these articles are a purchase subsequent. Per the Master of the Rolls, who decreed the devise by R. good, and that the Master inquire whether the plaintiff can make a title; if he can, the purchase-money to be paid by D.'s

E 4

executors

T. 1731, cor. M. R.

Langford v. Pitt,

2 P. Wms. 630.

2 Eq. Abr. 297. pl. 9.

Vide Lord Stourton and Sir

Thomas Mears.

Greenhill v. Greenhill,

2 Vern. 679. Prec. in Ch. 320.

Green v. Smith, 1 Atk. 572.

Potter v. Potter, 1 Vef. 437.

Affirmed by Ld. King on appeal.

executors out of his assets: the Master to see who has been in possession since *Lady-day* 1726, at which time the purchase-money was to be paid, and the conveyance completed. Interest and costs to be reserved.

M. 1733, cor. Jekyll, M. R.
Lechmere, Esq. v. Lord Carlisle
and others, 3 P. Wms. 228.

Ca. Temp. Talb. 80.

2 Eq. Abr. 31. pl. 42. (n.)

Vide *Deacon v. Smith*,

3 Atk. 323.

Attorney-General v. Whorewood,
1 Ves. 540. *Davys v. Howard*,

13. 30,000*l.* is covenanted to be laid out in land. The money need not be laid out all in one purchase, but if laid out at several times it is sufficient; and if the covenantor dies, having after the covenant purchased some lands which are left to descend, this will be a satisfaction *pro tanto*.

5 Bro. P. C. 55a. *Sowden v. Sowden*, cor. M. R. 3 Feb. 1785.

H. 1735, Canc.

Streetfield v. Streetfield,

2 Eq. Abr. 35. pl. 5.

Ca. Temp. Talb. 176.

Note; When a man takes upon him to devise what he had no power over, upon a supposition that his bill will be acquiesced under, equity will compel the devisee, if he will take advantage of the will, to take entirely but not partially under it, (*per* Lord Chancellor, who cited the case of *Noyes and Mordaunt*, 2 Vern. 581.) there being a tacit condition annexed to all devises of this nature, that the devisee do not disturb the disposition which the devisor has made. So are the several cases that have been decreed upon the custom of London.

14. *A.* by articles previous to his marriage, dated in 1677, agreed to settle certain lands to the use of himself and his intended wife for their lives and the life of the survivor, and after the survivor's decease to the use of the heirs of the body of the said *A.* by his wife, with remainders over. The marriage took effect; and by deed dated April 5, 1698, reciting the said articles, and which is declared to be in performance of the true intent and meaning thereof. *A.* settled the same lands to the use of himself and his wife for their lives, remainder to the heirs of the marriage, remainder to the right heirs of *A.* There is issue of the marriage one son and two daughters *M.* and *N.* In 1716, upon the marriage of *A.*'s son, *A.* settles other lands to the use of his son for life, remainder to the daughters of this marriage, remainder in fee to the son, with a power to raise 2000*l.* for younger children; after the son's death, *A.* levies a fine of the former lands to the use of himself in fee, and then makes his will, and devises part of the former lands to his said two daughters *M.* and *N.*, and all the rest of his real estate to trustees, to the use of plaintiff his grandson for life, remainder to his first, &c. son in tail male, remainder to his daughters in tail, remainder to testator's said daughters *M.* and *N.*, with several remainders over; and with directions out of the profits to educate the grandson, and to place out the rest of the profits at interest, to be paid to the grandson at twenty-one; and if he does not attain that age, to be paid to his said daughters *M.* and *N.*, their executors, &c. The question was, whether the settlement in 1698 was a proper execution of the articles of 1677? and if not, whether the general devise to the plaintiff should be taken as a satisfaction for what he was entitled to under the articles of 1677? and held

held *per Lord Talbot*, that plaintiff the grandson is not bound by the deed which did not pursue the articles; but then he shall make his election (within six months after he comes of age) whether he will stand to the will or the articles; and if he makes his election to stand to the latter, then so much of the other lands devised to him as will amount to the value of the lands comprised in the articles, and which were devised to the daughters his aunts, to be conveyed to them in fee. Decreed accordingly.

Vide Forrester v. Dr. Cotton, Amb. 388. as to the construction of the rule that he who takes under a will cannot dispute any part of it.

15. Any acts pleaded to be done in part performance, must be such as could not be done with any other view than to perform the agreement.

T. 1739, cor. Hardw. C.
Gunter v. Halfey, Amb. 586.
1 *Eq. Abr.* 19. pl. 2.
Vide Walker and Walker, ante,
f. 3. pl. 61. and *Pym v. Blackburn, f. 3. pl. 97. (n.)*

One party having in part performed an agreement, it is too late for the other to complain of fraud, surprise, or circumvention; for equity will decree a performance of the remaining part. *Vide Earl of Anglesey v. Anneley, 4 Bro. P. C. 421. Vide ante, sec. 3. pl. 62.*

16. Articles are considered in this court as minutes only, which the deed may afterwards explain more at large.

21 April 1743, cor. Hardw. C.
Marcbonets of Blandford v. Dukes of Marlborough,
2 *Atk.* 545.

§ C. There is no difference between articles unexecuted *in toto*, or in part only; for all the cases go upon this ground, that what is covenanted to be done, is considered as done.

The ruling case in this respect is *Coventry v. Coventry, 1 P. Wms. 222.*

17. Delivery of possession or payment of money is part performance of an agreement not reduced into writing.

9 Nov. 1743, cor. Hardw. C.
Lacon v. Martins, 3 Atk. 4.

18. An agreement not signed by one party is binding on him, where acquiesced in and acted upon, for it is the agreement of all.

1 Feb. 1748, cor. Hardw. C.
Owen v. Davies, 1 Vef. 82.

19. Covenant in marriage articles to buy land of the clear yearly value of 500*l.*, and settle the same; he directs by will that the moiety of a house and copyhold estate should be taken as part: held they should not. He also directs his estate at *M.* on lease at 180*l. per ann.* to be taken in part satisfaction. The rent was afterwards reduced to 150*l. per ann.*: held to be taken as at his death.

10 May 1751, cor. Hardw. C.
Pinnel v. Hallett and others, Amb. 106. 1 *Eq. Abr.* 26.
Vide Tyrconnel and Ancafter, Amb. 237.
Lord Londonderry v. Waine, Amb. 424.

20. One on marriage gave bond to settle an estate of inheritance on himself and wife, and the issue of the marriage; he settled the perpetuity of a pension payable out of the customs: held a good performance.

M. 1760, cor. M. R.
Middleton v. Pryor, Amb. 391.
Vide Thwaites v. Day,
2 *Vern. 80.*
E. of Bath's case, 2 Ch. Ca.

21. Mar-

H. 1766, cor. Hardw. C.
Cordwell v. Mackrill, Amb. 515.
Vide West v. Errisley, Trevor v.
 Trevor, Collins and Plummer.

21. Marriage articles, to settle land on husband and wife, and the heirs of the body of the husband by the wife. After marriage a settlement was made, reciting the articles, and said to be in performance of them, by which the estate was conveyed in the words of the articles. Husband and wife levied a fine, and agreed to sell the estate. Bill by son of the marriage to carry the articles into execution by a strict settlement, but the articles not being produced, bill dismissed.

See more under last and next Sections, and also under *Marriage Settlement, Money*.

Sec. 5. Of Parol Agreements; how far controlled by the Statute of Frauds and Perjuries: And herein of Part Performance and Execution of Parol Agreements, and such Circumstances as may be considered sufficient to carry a Case out of the Purview of that Statute.

H. 1682, cor. North, C. S.
Hollis v. Whiteing, 1 Vern. 151.
 1 Eq. Abr. 19. pl. 1.
Vide Lord Aylesford's case, Stra.
 783. *contra et vide post*, pl. 6.
Note; This case was never so
 decided, and has been often over-
 ruled. *Vide* Whitchurch and Bevis, 2 Bro. Ch. Ca. 564. *Cook v. Tombs*, 2 Anstr. 420. *Vide*
 also *Robertson v. St. John*, 2 Bro. Ch. Ca. 140. and *Pym v. Blackburn*, ante, f. 3. pl. 97. (n.)

1. BILL for an execution of a parol agreement for a lease of an house to plaintiff, who in confidence of the agreement had laid out money. Defendant pleads the statute of frauds. Plea allowed.

P. 1682, Canc.
Guilmer v. Battison, 1 Vern. 48.
 1 Eq. Abr. 17. pl. 4.
Vide Maynard v. Moseley, where
 such an agreement, after an estate-
 tail, was decreed, 1 Ch. Rep. 253.

2. Agreement parol by a feme whilst sole, that if she died without issue, she would leave her heir at law the land or 500 l. Agreement decreed to be executed.

P. 1682, Canc.
Newman v. Johnson, 1 Vern. 45.
 1 Eq. Abr. 197. pl. 1.
 This is a dictum per sollicitor-
 general only, and not a determination of the court.

3. Parol declaration is sufficient to charge lands with payment of debts, where a man has but an equity only.

Note; Creditors are so far favoured in equity, that whenever it appears to be the testator's intent that his lands shall be liable to his debts, equity will make them subject, though there are not express words of charge; but there must be something more than a bare declaration, otherwise it shall be intended out of the personal estate and not the real.

M. 1682, cor. Charleton, J.
 M. 1683, cor. North, C. S.
Moore v. Hart, 1 Vern. 110. 201.
 1 Eq. Abr. 22. pl. 16.
Vide Bird and Blossie,
 2 Vent. 361.

4. A father on a treaty of marriage of his daughter does by a letter written to a third person agree to give 1500 l. portion to his daughter, and to charge it upon his land; this, as it is a writing signed

signed by the party, takes it out of the statute of frauds and perjuries; and it being to charge land, is properly suable in equity.

5. *A.* by parol agrees with *B.* for a lease, which is drawn, and then perused and corrected by *A.*'s counsel, and afterwards engrossed and executed by *B.* Upon a bill to compel *A.* to execute a counterpart, she pleaded the statute of frauds in bar. Lord Keeper ordered *A.* to answer, and to save the benefit of the plea to the hearing.

H. 1683, cor. North, C. S.
Sir Jo. Lowther v. Carill,
1 Vern. 221.
1 Eq. Abr. 21. pl. 11.

6. There is a difference between money laid out in necessary repairs and lasting improvements, and money laid out for fancy and humour; the former shall be allowed, though not the latter. Where there was a parol agreement for a lease, and part of the agreement was, that the same shall be put into writing; the question whether such agreement be binding, was referred to a court of law.

M. 1683, cor. North, C. S.
Hollis v. Edwards,
Deane v. Izard, 1 Vern. 159.
1 Eq. Abr. 19. pl. 2.
Vide Hollis and Whiteing, ante,
pl. 1.

Note; As the statute of frauds and perjuries was made with a design to prevent, either in marriage or in any other treaties, uncertainty, perjury, or contrariety of evidence, several cases not

liable to these inconveniences have been determined to be out of the statute, upon the distinctions in the following cases, which seem the more necessary to be mentioned, as many of the printed cases on this subject take no notice of them, and by not giving all the circumstances of the case, frequently contradict each other. First, as to the distinction, that though the agreement be by parol, and in no part executed, yet if there be no uncertainty, the court will decree it; as in *Croyston v. Banes*, Prec. in Ch. 208. *Simondson v. Tweed*, Prec. in Ch. 374. *Gunter v. Halscy*, Amb. 586. *Sed quare*, Whether in these cases defendant insisted on the statute. *Vide Eyre v. Iveson*, T. 1785, cited 2 Bro. Ch. Ca. 563. and *Stewart v. Careless*, cited 2 Bro. Ch. Ca. 564, 565. and in *Whitchurch v. Bevis*, where Lord Thurlow allowed a plea of the statute of frauds, though a parol agreement was confessed by the answer. Secondly, That though the agreement be by parol, yet if it be agreed to be reduced into writing, and part of the agreement is executed, but the reducing of it into writing is prevented by fraud, it may be good; as in *Sir George Maxwell and Lady Montacute's case*, Prec. in Ch. 526. and 1 P. Wms. 618. Thirdly, Where the agreement is signed but by one party, yet it may be decreed on the circumstances of fraud; as in *Bawdes and Amhurst*, Prec. in Ch. 402., and *Mallett and Halfpenny*, reported 2 Vern. 373. nomine *Halfpenny v. Ballett*.

Vide Pym v. Blackburn, ante, sect. 3. pl. 97. and the special notes thereto subjoined.

7. Administratrix and her two children, entitled to a lease of a house, agree by parol to make a lease to *J. S.*, and the administratrix executes the lease. Upon a bill to compel the children to join, they cannot plead the statute of frauds.

M. 1683, cor. North, C. S.
Heigbter v. Starman,
1 Vern. 210.
1 Eq. Ab. 21. pl. 12.

8. A man having made his will, and his wife executrix, the son prevails on the mother to get his father to make a new will, and that he might be named executor, and promises to be a trustee for his mother. The mother had but a small legacy under the will. Trust decreed upon the point of fraud notwithstanding the statute.

1684, cor. North, C. S.
Thynn v. Thynn,
1 Vern. 296.
1 Eq. Ab. 380. pl. 6.
Vide Marriot and Marriot, in
Seacc. 12 G. 1. *Bransby and*
Kerridge, 5 G. 1. in Canc.
Smallpiece and Anguish.

9. A parol agreement for a purchase, and possession delivered, decreed to be performed against a sub-

H. 1685, cor. Jeffries, C.
Butcher v. Stapely & an.
1 Vern. 363.

1 *Eq. Ab.* 21. pl. 9.
Vide Pike and Williams,
 2 *Vern.* 455. where an agree-
 ment, though not signed, yet being in part executed, was decreed.

a subsequent purchaser with notice, who had a conveyance, and had paid his money.

H. 1686, cor. Jeffries, C.
Bellasi v. Benson,
 1 *Vern.* 369.
 1 *Eq. Abr.* 229. pl. 9.

10. A settlement of a jointure actually made is an evidence, that all parol agreements before the marriage were actually resolved into that.

M. 1687, cor. Jeffries, C.
Alfopp v. Patten,
 1 *Vern.* 472.
 1 *Eq. Abr.* 22. pl. 13.

11. *A.* and *B.* being joint lessees of a building lease, *A.* by parol agrees to sell his interest to *B.*, and accepts a pair of compasses in hand to bind the bargain. The defendant pleads the statute of frauds, is ordered to answer, and the benefit of his plea is saved to the hearing.

H. 1690, Canc.
Wheeler v. Newton,
Prec. in Ch. 16.
 2 *Eq. Abr.* 44. c. 5. *Gilb. Ch.* 245. *S. C.* more fully reported.

12. Sealing not necessary to bring an agreement out of the statute of frauds.

H. 1690, Canc.
Cokes v. Masfall,
 2 *Vern.* 34. 200.
 1 *Eq. Abr.* 22. pl. 18.

13. Marriage agreement is reduced into writing, but not signed by either party, yet decreed to be performed.

H. 1690, Canc.
Douglas v. Vincent,
 2 *Vern.* 202.
 1 *Eq. Abr.* 23. pl. 19.

14. One by letter under his hand promised 1000*l.* with his niece, but in his letter dissuaded her from marrying the plaintiff; and though he was afterwards present at the marriage, and gave her in marriage, yet the court would not decree the payment of the 1000*l.*, but left the plaintiff to his action at law.

M. 1694, Canc.
Wankford v. Fetherley,
 2 *Vern.* 322.
Affirmed in Dom. Proc. 1 *Eq. Abr.* 22. pl. 17. 2 *Freem.* 201.
S. C. where the reporter says, that Lord Keeper cited two cases, viz. *Hart v. Moore*, where a portion was decreed upon a letter written; and *Masquill v. —*, where writings were prepared and approved, but being blotted, were ordered to be written fair, and were so; but before they were sealed the party died, and equity charged the executors with the portion.

15. One by letter says he will give 1500*l.* with his daughter; the daughter marries, and the father is privy to it, and seems to approve of it: the daughter dies, and the husband takes administration. The father decreed to pay the 1500*l.* portion.

M. 1702, Canc.
Croyston v. Banes,
Prec. in Ch. 208. *Gilb. Ch.* 237.
 1 *Eq. Abr.* 19. pl. 3.
 M. 1713, Canc.
Symondson v. Tweed,
Prec. in Ch. 374.
Gilb. Ch. in *Eq.* 35.

16. If on a bill brought to have execution of a parol agreement, the defendant by answer confesses the agreement, without insisting on the statute of frauds, &c. the court will decree an execution, because no danger of perjury from a contrariety of evidence.

Vide 2 *Eq. Abr.* 44. c. 6. 47. 15. 1 *P. Wms.* 618. *Prec. in Ch.* 526. 534. 2 *Ves.* 441. 1 *Bac. Abr.* tit. Agreement, 6. 2 *Str.* 783. 1 *Vern.* 151. 159. 2 *Vern.* 373. — *Vide* Gunter and Halfey, Amb. 586. *Sed quere*, if defendant insisted on the statute? — *Vide* Eyre and Ivison, T. 1785, cited 2 *Bro. Ch. Ca.* 563.; and Stewart and Careless, cited 2 *Bro. Ch. Ca.* 564, 565.; and in *Whitchurch and Bevis*, 2 *Bro. Ch. Ca.* 559., where Lord Thurlow allowed a plea of the statute of frauds, though a parol agreement was confessed by the answer.

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17. A public survey is held for sale of an estate, and *A.* offering 1250*l.* for it, it is accepted and agreed to, and conveyances are ordered to be got ready, and *A.* is put into possession; but disputes arising about settling the conveyance, *A.* gets an assignment of a mortgage to which the estate is subject, and antedates it, and refuses to go on with the purchase. Though the agreement was only by parol, yet on the circumstances of the case *A.* is decreed to proceed in the purchase.

H. 1703, Canc.

Pyke v. Williams,

2 Vern. 455.

1 Eq. Abr. 21. pl. 9.

Vide Foxcroft and Lister, Colles'

P. C. 108. *Butcher and Stape-*

ly, ante, pl. 9.

18. Equity will relieve in case of a fraud, although there be nothing in writing to charge the party; as if *A.* agrees with *B.* by parol for a lease of ground; *B.* enters and builds, and then *A.* refuses to grant him a lease. On a bill by *B.* to have this agreement executed, *A.* pleads the statute of frauds; the agreement being parol, court overruled the plea, and the Master of the Rolls afterwards decreed *A.* to perform the agreement, and to pay costs.

M. 1703, Canc.

Floyd v. Buckland, 2 Freem. 268.

2 Eq. Abr. 44. pl. 7.

Vide Twyne's case, 3 Co. 82.

Butcher's case, 1 Eq. Abr. 21.

pl. 9. 1 Eq. Abr. 20. pl. 5. S. P.

2 Freem. 285. S. P. *Foxcroft's*

case, Glib. Eq. Rep. 4. 11. and

Colles' P. C. 108. Savage and

Foster, 9 Mod. 37.

19. Bill for a discovery of assets. A term had been assigned to defendant, and it was supposed to be in trust to attend the inheritance of testator, but no trust was declared in writing, and defendant by his answer denied the trust. C. S. declared, that though he was satisfied of the trust, yet as there was no writing to declare it, he could not imply one in opposition to the very letter of the statute of frauds.

P. 1705, cor. Cowper, C. S.

Skett v. Whitmore, 2 Freem. 281.

20. The provost and scholars of *King's College, Cambridge,* being seised in fee of the tithes of *P. Q. cum pertinentiis,* by deed demised the same to *D.* for 21 years, who afterwards in consideration of 350*l.* covenanted to convey to defendant, his executors and assigns, the said tithes during her interest therein; then the plaintiff treats with defendant for these tithes, and defendant sends his son and two other persons with a letter to plaintiff, wherein defendant said, *that if he parted with the tithes, it should be on the conditions therein particularly mentioned.* Plaintiff accepted of the terms, and the next day sent his attorney to acquaint defendant with it, and defendant delivered to the attorney a copy of *D.*'s agreement, and appointed a day for executing the same; but in the mean time defendant went to *D.* (*who had notice of defendant's agreement with plaintiff*) and settled a conveyance from her.—Lord Keeper decreed defendant to perform this

H. 1706, cor. Cowper, C. S.

Coleman v. Upcott,

5 Vin. Abr. 527. pl. 17.

2 Eq. Abr. 45. pl. 9.

Note; if a man (being in company) makes offers of a bargain, and then writes them down and signs them, and the other party takes them up and prefers his bill, this shall be a good bargain, and the party shall be compelled to a specific performance of it. Dict. per C. S. in S. C.

this agreement, for that it was directly within the statute of frauds, as being an agreement *signed by the party to be charged with the same*, and there was no need of its being signed by both parties; and plaintiff by his bill has submitted to perform his part of the agreement. This, though it was not at first a contract, but conditional only, if the other would accept of it, yet when the other had accepted of it, it was all one; and defendant intended it so by his sending his son with the letter, and two persons besides.

H. 1707, cor. Cowper, C.
Lord Guernsey v. Rodbridges,
Gilb. Eq. Rep. 4.
2 Eq. Abr. 518. pl. 1.
S. C. but not S. P.

21. Where a parol agreement is begun to be put in execution, and intended to be continued, equity will enforce the execution of it, notwithstanding the statute of frauds.

M. 1708, cor. Cowper, C.
Hales v. Vandercbem & Ux.
2 Vern. 617.

22. Agreements since the statute of frauds, &c. are not to be part parol and part in writing, yet a deposit for a performance of a written agreement, though there is no writing declaring the deposit to be a security, is not within the purview of the statute.

M. 1708, cor. Cowper, C.
on Appeal from the Rolls,
Lamas v. Bayley, 2 Vern. 627.
1 Eq. Abr. 22. pl. 14.

23. *A.* and *B.* being severally in treaty to purchase a house and toft of land, they agree by parol that *A.* shall desist, and that *B.* shall purchase, and let *A.* have part of the ground which he wanted at a proportionable price. *B.* purchases, and refuses to perform the agreement. This being a parol agreement, is within the provision of the statute of frauds.

1708, cor. Cowper, C.
Anon. 5 Vin. Abr. 521. pl. 32;
2 Eq. Abr. 45. pl. 10.

24. *A.* enters into treaty with *C.* about a parcel of land, and so did *B.* *A.* tells *B.* that if he would desist, and permit him to go on with his intended purchase, he would let him a parcel of ground which he desired; to this *B.* agreed, and *A.* afterwards completed his purchase with *C.*; then *B.* desires *A.* to let him have the parcel of ground; *A.* answers, that now he could not, because it would be more convenient to him; and says, "though I intended to let you have it, as the circumstances then were, yet my purpose and intentions are now altered." *B.* brings a bill to have a performance of this agreement; *A.* insists that he made no absolute promise, and sets forth such agreement as before, and also insists upon the statute, that there ought to have been an agreement in writing. Lord Chancellor—Here is no absolute and positive agreement, but the words are ambiguous

ambiguous and uncertain; and the statute intended to oust as well all such ambiguous agreements as to prevent perjuries, &c. This agreement will not bind unless it were in writing.

25. The father purchases lands to him and his heirs, and when he was on his death-bed sends for his eldest son, and tells him that these lands were bought with his second son's money, and that he intended to give them to him; whereupon the eldest son promised that he should enjoy them accordingly. The father dies. Held per Lord Keeper Wright and Master of the Rolls, that the eldest son ought to have these lands, because by the statute of frauds there should have been a declaration of the use or trust in writing. But Cowper C. was of another opinion, because of the fraud in this case, in that the eldest son promised the father upon his death-bed that the other should enjoy the lands; so he took this to be a case out of the statute.

M. 1708, cor. Cowper, C.
Sillack v. Harris,
5 Vin. Abr. 521. pl. 31.
2 Eq. Abr. 46. pl. 11.

26. J. C. being seised of copyhold lands as a provision for his son, surrenders the reversion after his decease to him in tail, and 14 years after he treats with Sir C. C. for a marriage between his son and Sir C.'s daughter. Sir C. proposed to give with his daughter 2000 l. if J. C. would make a suitable jointure; and thereupon J. C. proposed to settle houses in Chancery-lane and in Queenhithe, but he having only a term for years in them, Sir C. rejected the offer, and said to J. C., that he wished the copyholds might be the lands and the houses in Queenhithe. J. C. replied, that the copyholds were already settled upon his son, and that the houses in Queenhithe should be settled upon his daughter. Upon this assurance the marriage proceeded, and the houses in Queenhithe were covenanted to be settled for her jointure, and to the heirs of her body in full satisfaction of all dower and thirds. The 2000 l. is paid, and the marriage took effect. Afterwards J. C. the father married a second wife; before which second marriage, in consideration of a certain portion to be paid, (400 l. of which was not paid,) he covenants with the plaintiff to jointure the copyholds upon his intended wife; and to shew that he had a power so to do, he produced the settlement upon his son's wife, wherein was no mention of the copyholds: and to carry those last articles into execution, the plaintiff being trustee, preferred this bill, and alleged that the

P. 1709, cor. Cowper, C.
Heister v. Clarke,
2 Eq. Abr. 46. pl. 13.

the surrender to J. C.'s son was fraudulent. Lord Chancellor was of opinion it stood clear of all fraud, and was well designed as a provision for the son, which is by the father declared to be the cause of the surrender: the subsequent agreement renders the son a valuable purchaser, and the case stands clear of the statute of frauds; for it was not necessary that that part of the agreement which relates to the copyholds should be reduced into writing; for the son then had a legal estate in him, and the marriage must be understood to proceed both upon the assurance of copyholds being settled upon the son, and that part of the agreement comprised in the deed. Bill dismissed with costs as against the son.

H. 1710, cor. Cowper, C.
Hall v. Butler,
1 Eq. Abr. 20. pl. 7.

27. On a treaty of marriage between defendant's son and plaintiff's daughter. Defendant agreed to settle an estate in fee of 60*l.* *per ann.* on his son, and take him into partnership; and plaintiff agreed to give a leasehold estate of 300*l.* *per ann.* as a portion with his daughter. The son wrote his father the nature of this agreement, and received his answer and approbation. The marriage took effect, and on the marriage-day the wife fell sick of the small-pox: she recovered; but the son caught it, and died. During his sickness he made a will, and devised the leasehold estate to his father. The widow and her father brought their bill to have the agreement performed in specie, insisting that the son's letter, and the father's answer, would carry it out of the statute of frauds; but the father denied the contents of the son's letter, and said he had burnt it among waste paper. The Chancellor doubted if he could relieve the plaintiffs and recommend a compromise.

1712, cor. Harcourt, C.
Hodgson v. Hutchinson,
5 Vin. Abr. 522. pl. 34.
2 Eq. Abr. 47. pl. 14.

28. A. encouraged the courtship of his son with B.'s daughter, who promised by letter to give her 500*l.* if A. would settle 100*l.* *per ann.* on the son, which A. refused. The son and daughter married privately; and after this letter was written, A. consented and B. refused. On a bill for performance of this agreement it was objected, that these promises were within the statute of frauds, and that the letter, being after the marriage, should not bind. But decreed *contra* by C. S. on the circumstances of the father's privity and consent to the match, and of the marriage, by

by afterwards approving it. That it was out of the statute, if no letter had been written, for the agreement is admitted by the answer; but this case does not depend on parol evidence or admissions: for the letter after marriage, considering the transactions before, is sufficient. The offer to settle 100*l.* *per ann.* shall be in tail, with a power to the husband to charge it, with 500*l.* for younger children, being the mother's portion; and decreed accordingly.

29. On a marriage treaty the intended husband and young lady's father went to a counsellor's chambers to have a settlement drawn, in consideration of the portion the father proposed to give. Minutes of the agreement were taken down in writing by the counsel, and given by him to his clerk to be drawn up in form. The next day the father dies, and the day following the marriage was solemnized. This agreement, notwithstanding these preparations, held to be within the statute of frauds and perjuries.

tween this case and Welford and Beazley was that there the defendant signed a complete agreement, knowing the contents, and was bound by it, but here the writing was only a sketch not confirmed, and in the father's hands.

30. One point in this case was, whether an agreement, *not in writing, being executed on one part, and an enjoyment accordingly, could be so far impeached as to lay the party open to an account for the profits he had received under this enjoyment?* The court was clear of opinion it should not; for this would be much harder than setting aside the agreement at first for want of writing, which yet, *if executed on one part*, had been always looked upon so far conclusive as to induce the court to decree an execution on the other part, and not to destroy or avoid the agreement, so far as it was already carried into execution.

31. Upon a marriage treaty instructions are given by the husband to draw a settlement, and by him privately countermanded, and afterwards he persuades the woman, by assurances of such settlement, to marry him. This agreement shall be executed.

pl. 6. (n.) *Pym v. Blackburn*, *ante*, f. 3. pl. 97. (n.) — *Vide* more as to pleas of the statute of frauds in case of parol agreements, *Hawkins and Holmes*, 1 *P. Wms.* 770. and *Whitchurch and Bevis*, 2 *Bro. Ch. Ca.* 559. and under tit. *Plea (post)*.

32. *A.* agrees with *B.* a broker for 5000*l.* *South-Sea stock.* The broker, according to usage, made
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P. 1715, cor. Cowper, C.

Barwell v. Amburst,

Pres. in Cb. 402.

1 *Eq. Abr.* 21. pl. 8.

2 *Cb. Rep.* 284.

Vide *Pres. in Ch.* 208. 174. 380.

526. 533. *Gilb. Ch.* 218.

Mallet v. Halfpenny, 2 *Vern.*

373. and 1 *Eq. Abr.* 20. pl. 6.

In *Welford and Beazley*, 3 *Atk.*

504. Lord Hardwicke denied

the general doctrine as laid down

in this case, though true as ap-

plied to this case by Lord Cow-

per, and said the difference be-

tween this case and Welford and Beazley was that there the defendant signed a complete agreement,

knowing the contents, and was bound by it, but here the writing was only a sketch not confirmed, and

in the father's hands.

T. 1719, cor. Macclesfield, C.

Lockey v. Lockey, *Pres. in Cb.* 518.

2 *Eq. Abr.* 48. c. 18.

Vide *Pres. in Ch.* 208. 374.

402. 526. 533. 560. 1 *Vern.*

151. 363. 473. 2 *Vern.* 455. 6.

1 *P. Wms.* 970. 2 *Eq. Abr.* 46.

c. 12. 16. 1 *Vesf.* 82. 441.

Bunb. 65. *Stra.* 173. 1 *Atk.*

12. 3 *Atk.* 2. *Whitchurch*

and *Bevis*, 2 *Bro. Ch. Ca.* 509.

Lamas v. Bailly, 2 *Vern.* 627.

contra.

Vide *Hollis and Edwards*, *ante*,

pl. 6. (n.) *Pym v. Blackburn*,

ante, f. 3. pl. 97. (n.)

P. 1720, cor. Parker, C.

Lady Montacute and Sir George

Maxwell her Husband,

1 *P. Wms.* 618. *Pres. in Cb.* 526.

1 *Eq. Abr.* 19. pl. 4.

1 *Stra.* 236. *Gilb. Ch.* 244.

2 *Eq. Abr.* 592. pl. 6.

Vide *Hollis and Edwards*, *ante*,

pl. 6. (n.) *Pym v. Blackburn*, *ante*, f. 3. pl. 97. (n.) — *Vide* more as to pleas of the statute of

frauds in case of parol agreements, *Hawkins and Holmes*, 1 *P. Wms.* 770. and *Whitchurch and*

Bevis, 2 *Bro. Ch. Ca.* 559. and under tit. *Plea (post)*.

T. 1720, cor. Parker, C.

Musfill v. Cooke, *Pres. in Cb.* 533.

2 Eq. Abr. 49. c. 19. and 70.
c. 9.

Vide 2 P. Wms. 308. Bunb. 135. 5 Vin Abr. 507. pl. 18. 3 Burr. 1921. *et vide* Cud and Rutter, 1 P. Wms. 570. 2 Eq. Abr. 18. pl. 8. where M. R. decreed a specific performance of a contract for South-Sea stock; but his Honour's decree was reversed on appeal to the Lord Chancellor; and in Buxton and Lister, 3 Atk. 383. Lord Hardwicke said, that ever since this reversal of his Honour's decree it has been the constant rule not to entertain a bill for a specific performance in case of a chattel.

Vide Hawkins and Holmes,
1 P. Wms. 770.

P. 1721, Canc.

Seagood v. Meale and Leonard,
Prec. in Ch. 560.

2 Eq. Abr. 49. pl. 20.

1 Stra. 426.

Vide Gilb. Ch. 238. 2 Eq. Abr. 49. pl. 20. 1 Stra. 426. 1 Atk. 12. S. P. & *quare* if not S. C. 6 Com. Dig. tit. Agreement, 136. 2 Eq. Abr. 46. pl. 12. Stat. 23 Geo. 3. c. 58. *Note*; In this case the statute was insisted upon by way of answer.

M. 1721, cor. Macclesfield, C.

Hawkins v. Holmes,

1 P. Wms. 770.

2 Eq. Abr. 50. pl. 24.

Vide Ithell and Potter, determined at the Rolls, T. 1719, on the same point.

Vide Stokes and Moore, in Scacc. 1 Mar. 1786, 1 P. Wms. 771. (n.) Tawney and Crowther, 3 Bro. Ch. Ca. 318. where a letter referring to and promising to perform an agreement, though not signed, was held to take it out of the statute.

Note; Where one party has been permitted by the other to act upon a parol agreement, it is considered as a species of fraud in the latter to insist upon the statute as a bar to a specific performance of the whole agreement. *Vide* Hollis v. Edwards, 1 Vern. 159. Butcher v. Stapely, 1 Vern. 363. Foxcroft v. Lister, cited 2 Vern. 456. Lamas v. Bailey, 2 Vern. 627. Floyd v. Buckland, 2 Freem. 268. Savage and Foster, 9 Mod. 37. Lord Pengal v. Rois, 2 Eq. Abr. 46 pl. 12. Anon. 2 Eq. Abr. 48. pl. 16. Lockey and Lockey, Prec. in Ch. 519. Seagood v. Meale, Prec. in Ch. 561. Clerk v. Wright, 1 Atk. 12. Lacon v. Mertins, 3 Atk. 4. Earl of Aylesford's case, 2 Str. 783. Gunter and Halsley, Amb. 586. Whaley v. Bagenal, 6 Bro. P. C. 45. Whitbread v. Brockhurst, 1 Bro. Ch. Ca. 404. — In what cases, and in what manner the statute of frauds may be pleaded to a bill for a specific performance of a parol agreement. *Vide* Whitbread and Brockhurst, 1 Bro. Ch. Ca. 404. Whitchurch v. Bevis, 2 Bro. Ch. Ca. 559.; and the cases there mentioned.

M. 1721, in Scacc.

Borrett v. Comerferra,

Bunb. 94.

Vide 1 Vern. 364. 151. 159. 473. 2 Vern. 200. 373. Prec. in Ch. 526. 561. — *Quere*, if copyholds are included in the general words of an act? Haydon's case and Hard. 433. — How far equity will carry a parol agreement in part executed into full execution. *Vide* 2 Ch. Ca. Leake v. Morrice, Hatton v. Grey, Lyffer v. Pycroft, Bawdes v. Amhurst, Seagood v. Gold.

an entry of this agreement in his pocket-book, it being no otherwise reduced into writing, is within the statute of frauds.

S. C. In pleading the statute of frauds, it is necessary to say that the agreement was not reduced into writing.

35. A. agrees with B. for the purchase of nine houses which were in mortgage to J. S., and pays him a guinea in earnest. B. writes a note to J. S., and desires him to deliver up his writings to the bearer, he having agreed to dispose of them, which J. S. refused, unless all the mortgage-money was paid him down, and afterwards purchases the houses himself. On a bill brought by A. for a specific execution of the agreement it was held, that neither the guinea paid down, nor the note, (which was only an evidence of assent, but did not ascertain the terms of the agreement,) were sufficient to take it out of the statute of frauds and perjuries.

34. One alters a draft with his own hand for purchasing an estate. This is not a signing to take it out of the statute of frauds, though the seller afterwards executes the conveyance, and causes it to be registered in *Middlesex*.

35. Parol agreement for the sale of copyhold lands carried into execution.

36. A letter from a father to his daughter, by which he agrees to give her 3000*l.* portion, and this not shewn to the man who afterwards marries her, does not take the promise out of the statute of frauds; for he could not be supposed to have married her in confidence of a letter which he had not seen.

The father agrees to give his daughter 3000*l.* as a marriage portion with the plaintiff, and, having devised 2000*l.* to her, died before the marriage. Decreed that the husband shall not have the other 1000*l.*, because he knew that 2000*l.* was devised to her, and having accepted that legacy in marriage, he shall have no more.

37. A parol agreement being confessed in answer shall be executed, though not in writing. The agreement in this case was originally in writing, but was lost.

an agreement the court will decree execution of it. *Vide Clerk v. Wright*, 1 Atk. 12. *Earl of Aylesford's case*, Str. 783. *Lacon v. Mertins*, 3 Atk. 4. *Butcher v. Stapely*, 1 Vern. 363. *Lockey v. Lockey*, Prec. in Ch. 519. *Walker v. Walker*, 2 Atk. 100. *Gunter v. Halfey*, Amb. 586. *Whitebread v. Brockhurst*, 1 Bro. Ch. Ca. 404. 417.—It would be of dangerous consequence to admit a parol agreement in evidence against a written agreement. *Vide Partridge v. Powley*, 2 Atk. 381. *Lake v. Phillips*, 1 Ch. Rep. 110. *Irnham v. Child*, 1 Bro. Ch. Ca. 92. *Patmore v. Morris*, 2 Bro. Ch. Ca. 219. *Hare v. Sherwood*, 3 Bro. Ch. Ca. 168. *Jordan v. Sawkins*, 3 Bro. Ch. Ca. 388.

38. *H.* enters into a contract in writing with plaintiff for the purchase of a college lease. Plaintiff agrees to renew the lease in *H.*'s name, or such persons as he should appoint. *H.* directs plaintiff to renew the lease in *C.*'s name, and declares he bought it for him as his agent. Plaintiff brings a bill against both for the residue of the purchase-money. The decree at the Rolls was against both defendants to pay the money; and in case *H.* should pay it, then he to be at liberty to prosecute the decree in plaintiff's name against defendant *C.* the principal. *C.* appeals; for that he did not give any authority in writing to *H.* to buy it for him, and therefore by the statute of frauds he ought not to be bound by the contract. *Macclesfield, C.* affirmed the decree; for that the authority to treat or buy for him may be good without writing, though the contract itself must be in writing by the statute of frauds.

39. *A.* having lands and a personal estate, before her marriage conveys all her estate to her separate use; to which the intended husband was a party, and he covenanted that he would not interfere with it.

T. 1722, cor. Macclesfield, C. Ayliffe v. Tracey, 1 P. Wms. 65.
2 Eq. Abr. 50. pl. 25.

S. C. as stated in 9 Mod. 3.
2 Eq. Abr. 19. pl. 15.
Vide 1 Vern. 68. 2 Vern. 202.
1 Eq. Abr. 21. Stra. 738.
1 Vef. 530. Amb. 424.
2 Com. Dig. tit. Chancery,
3 Z. 2. 1 Fontbl. Eq. 179.
In the register-book, fo. 285.
A. 1721, nothing appears but the order of dismissal.

H. 1724, Canc.
Hoffer v. Read, 9 Mod. 86.
Vide 2 Com. Dig. Ch. 2 C. 4.
2 Bro. Ch. Ca. 559. *Whitechurch and Bevis*. Where a man takes possession in pursuance of

M. 1724, cor. Macclesfield, C. Waller v. Hendon and another,
5 Vin. Abr. 524. pl. 45.
2 Eq. Abr. 50. pl. 161.

T. 1725, cor. King, C. Christmas v. Christmas,
Sel. Ca. in Ch. 20.
2 Eq. Abr. 152. pl. 16.

* The word *executed* is not in the original.

On this estate there was a mortgage for 300*l.*, which, before these conveyances [executed*], he verbally promised to discharge. During the coverture the mortgage was assigned over, and he covenanted thus: *That I or my wife shall pay it.* The husband and wife lived with great affection together, and he constantly received all the profits of this separate estate. He died, never having paid off the mortgage, leaving fortunes to children which he had by a former *ventre*: these the wife maintained after his decease. She brings her bill, 1st, that her husband's effects should be applied to the redemption of the mortgage; 2dly, to have an account of the profits of her separate estate received by the baron; 3dly, to have an allowance for the maintenance of his children after his decease. Decreed that the husband's effects should not be charged to redeem the mortgage, nor be accountable for the profits of her separate estate received by him; and that the maintenance should be counterbalanced by the interest of their fortunes. On a rehearing, King, C. said, that there is no foundation to charge the husband with the payment of the mortgage; for by the statute of frauds, it is not a charge unless reduced into writing. All is at an end when there is an agreement in writing; all the conversation was only a previous step. This is the ultimate settlement of the whole, affair on mature consideration of every thing as between him and the mortgagee he might be charged, but not by the wife. As to the receipt of the separate maintenance, if they lived together amicably, it shall be looked upon as done by the wife's consent: as to the maintenance, she has taken it upon herself, and it doth not appear but the interest is sufficient for that purpose. Decree affirmed.

8 July 1725, cor. Macclesfield, C.

Crull v. Dodson, Sel. Ca. in Ch. 41.

2 Eq. Abr. 51. pl. 28.

5 Vin. Abr. 507. pl. 18.

Vide *Capper v. Harris*, Bunb.

135. where it is said *per* Baron Gilbert, that if a contract for South-Sea stock be executed, equity will not unravel or break into it; if executory, equity will not aid but leave plaintiff to seek his remedy at law.

40. Defendant was a broker, and had 5000*l.* South-Sea stock of the plaintiff's in his hands, who told him he would sell when stock came to 200*l.* Defendant, when the stock was risen beyond that price, told him he had sold 1000*l.* of it to A. at 200*l.* per cent., and 500*l.* to B. who was his partner, and the rest he had taken himself at that price; and entries were made in books accordingly, but in such manner, that it looked as if done after the rise of stock, and only designed as an evidence in case of a dispute. The plaintiff insisted, that, at the time of the pretended sale, stock was at 300*l.*, and insists on that price. The affair was left to arbitrators,

arbitrators, and 4000*l.* deposited as a security for so much as should be due. The arbitrators did nothing; so a decree was for the 4000*l.*, against which the defendant petitions. The court was of opinion it was a fraudulent transaction, and that on the sale, if such there was, he should have taken earnest; for it has been determined, that such a bargain is within the statute of frauds, and without earnest only nudum pactum. The decree should have been to account for the 5000*l.*, and the produce of it; but as the plaintiff acquiesces under the decree, and it is reheard on defendant's petition, the court would do no more than affirm the decree.

41. The judges equally divided on this question, whether a contract for stock be within the statute of frauds which mentions goods, wares, and merchandises? so as to require the contract to be in writing, or earnest money to be paid.

M. 1725, cor. King, C.
Colt v. Natterville,
2 P. Wms. 308.
Pickering v. Appleby, Com.
Rep. 354. seems to be the case
where the judges were divided in
opinion on this point. *Sed vide*
Crull and Dodson, ante, pl. 40.

42. Bill for a specific performance of a promise by defendant to procure plaintiff to be made deputy to defendant's son as clerk of the House of Peers, or otherwise to provide for him, in consideration of plaintiff's insisting upon and soliciting in procuring a reversionary grant of that place for defendant's son, which defendant now enjoyed. Defendant pleaded the statute of frauds, and that the promise was not in writing, nor to be performed within one year; and also the statute of limitations, that the promise was made above six years before the bill filed. Plea allowed in both respects.

T. 1726, in Scacc,
Reynolds v. Cowper,
5 Vin. Abr. 524. pl. 47.
2 Eq. Abr. 73. pl. 24.
Vide contra, Bac. Abr. 75.

43. The statute of frauds is not pleadable where a parol agreement for a lease is executed in part, and six years possession had.

M. 1728, Canc.
E. of Aylesford's case, 2 Stra. 783.
In Smith v. Turner, 2 Eq.
Abr. 49. pl. 23. and in Seagood
v. Meale, Prec. in Ch. 564. it is said, that if a lessee had been put to no expence, a promise of a lease,
though accompanied with possession, would not be sufficient to oblige the lessor to execute a lease. But in
many of the following cases it has been held otherwise; in which cases equity has enforced the performance
of a parol agreement partly carried into execution, notwithstanding the statute of frauds. *Vide*
Hollis v. Whiteing, 1 Vern. 151. Hollis v. Edwards, 1 Vern. 159. Butcher v. Stapely, 1 Vern. 363.
Pyke v. Williams, 2 Vern. 455. Foxcroft v. Liller, 2 Vern. 456. Gilb. Eq. Rep. 4. 11. S. C.
Lamas v. Bayley, 2 Vern. 627. Savage v. Foster, 9 Mod. 37. Lord Pengal v. Rofs, 2 Eq. Abr. 46.
pl. 12. Anon. 4 Geo 1. Vin. Abr. tit. Contract (H), c. 38. 40. Lockey v. Lockey, Prec. in
Ch. 519. Seagood v. Meale, 1 Str. 426. 2 Eq. Abr. 49. c. 20. Prec. in Ch. 560. S. C. Clerk v.
Wright, 1 Atk. 12. Lacon v. Mertins, 3 Atk. 4. Gunter v. Halsey, Amb. 586. Whaley v. Bage-
nal, 6 Bro. P. C. 45. Whitbread v. Brockhurst, 1 Bro. Ch. Ca. 404. Whitchurch v. Bevis, 2 Bro.
Ch. Ca. 559.

44. If two neighbours agree that one shall take a lease of houses for the benefit of both, the other

M. 1729, cor. King, C.
Atkins & al. v. Rowe, Mos. 39.
Vide 2 Vern. 627. 1 Vern. 296.

shall have the benefit, though the agreement is not in writing; and defendant's plea of the statute of frauds was ordered to stand for an answer, with liberty to except, and the benefit of it saved to the hearing.

8 Feb 1737, cor. Hardw. C.
Clark v. Wright, 1 *Atk.* 12.

45. *A.* agrees for the purchase of an estate, but the agreement is not reduced into writing. Although *A.* in confidence thereof went several times to view the estate, and gave orders for conveyances to be drawn; this court will not carry such agreement into execution, and the statute of frauds may be pleaded to a bill brought for that purpose.

S. C. A letter is not sufficient evidence of the agreement, unless the terms of the agreement are mentioned therein. But where a man takes possession, or does any act of the like nature in pursuance of an agreement, this court will decree an execution of it.

P. 1737, cor. Hardw. C.
Buckhouse v. Crosby & al.
2 *Eq. Abr.* 32. pl. 44.

46. *M.*, being seised in fee of lands in the manor of *B.*, borrowed 100*l.* of *J. C.* on mortgage of them on 7 *October* 1730, and afterwards *M.*, by letter dated 18 *April* 1731, authorised *K.* an attorney to sell the estate, which he sold to plaintiff for 300 guineas *by parol*, and received one guinea in earnest. *K.* by letter advised *M.* of the sale, which *M.* accepted by letter, dated 8 *June* 1731. In *July* 1731 *M.* wrote to one *H.*, offering to sell same premises to him for 300 guineas. *H.* and defendant *C. C.* (on behalf of *J. C.* the mortgagee) agree with *M.* for the purchase at that price, and accordingly *M.* by indenture, dated 16 *August* 1731, conveyed the premises to *J. C.*, in consideration of 300 guineas then paid, before this conveyance. *H.* and *C. C.* had notice of plaintiff's title, but being examined as witnesses for *J. C.*, they both swore, that before the conveyance was executed to him they sent for plaintiff, who agreed that all prior contracts between him and *M.* should be void, and that it should be referred to *M.* whether plaintiff or *J. C.* should be the purchaser, and that *M.* by letter preferred *J. C.* Plaintiff brought his bill for a specific performance of the contract with *K.*, and confirmed by letter from *M.* To take off the testimony of the witnesses who swore to the waiver of the contract, it was proved, that *C. C.* was

was tenant of the land and paid rent to J. C., and that H. had declared that he and J. C. were to divide the purchase between them. *Per cur.*—The objection as to C. C. was sufficient entirely to take off his testimony, but as to H. it went only to his credit. Decreed for plaintiff with costs. Lord Chancellor said, here was a contract on the part of M., and though it was suggested that a mutual contract in writing should appear on both sides, yet that objection has been as often over-ruled. If a contract in writing was to be waived by parol, very clear proof is expected, which, in the principal case, was not so clear. The statute of frauds requires *all contracts concerning land should be in writing*. An agreement to waive a purchase contract is as much concerning lands as the original contract; but no occasion now to determine this point.

47. A court of equity will not lay down any other rule of construction with regard to the statute of frauds and perjuries than a court of law does. 27 Nov. 1738, cor. Hardw. C. *Ruffel & al. v. Hammond & al.* 1 Atk. 13. *Vide* 2 Ch. Ca. 84. 1 Vern. 100, 101. 464. 2 Vern. 40. 475. S.P. Eq. Abr. 23. 2 Ventr. 3. 65.

48. It is not only contrary to the statute of frauds, but to the common law before the statute, to add any thing to an agreement in writing by parol evidence. 2 Aug. 1742, cor. Hardw. C. *Parteriche v. Peroulet*, 2 Atk. 383.

49. The statute requires that all declarations of trust should be in writing, otherwise they are absolutely void, except such as arise by construction of law. 7 Nov. 1740, cor. Hardw. C. *Willis v. Willis*, 2 Atk. 71.

S. C. There is another way of taking a case out of the statute, which is by admitting parol evidence to shew the trust, from the mean circumstances of the pretended owner of the real estate, that makes it impossible for him to be the purchaser.

50. A. on an account stated owes B. 400*l.* A. agrees to give bond for 100*l.* and to secure the remaining 300*l.* by mortgage. A. delivers a deed of conveyance to C. an attorney, who takes instructions to draw mortgage; but before the bond or mortgage is executed, A. dies. Though this agreement by parol be proved, yet, on a bill brought against the heir of A., the court refused to carry it into execution. P. 1742, cor. Hardw. C. *Brizick v. Mannert*, 9 Mod. 284.

51. The bare attesting a deed as a witness, will not create a presumption of knowledge so as to affect 27 May 1747, cor. Hardw. C. *Welford v. Bezzely*, 1 Vef. 7.

Vide Mallett v. Halfpenny,
Prec. in Ch. 403. 2 Vern. 373.

S. C. 3 Atk. 503.

3 May 1749, cor. Hardw. C.
Attorney-General v. Day,
1 Vesf. 221.

24 July 1749, cor. Hardw. C.
Taylor v. Beech, 1 Vesf. 297.

7 May 1750, cor. Strange, M.R.
Potter v. Potter, 1 Vesf. 441.

13 Mar. 1765, Dom. Proc.
Whaley v. Bagenal,
6 Bro. P. C. 45.

14 April 1766, Dom. Proc.
Lady Herbert v. Earl of Powis
and others, 6 Bro. P. C. 102.

3 Feb. 1773, Dom. Proc.
Lord Milon v. Edworth & al.
6 Bro. P. C. 587.

affect with any fraud; but if there is knowledge of the contents, signing as a witness is a sufficient signing within the statute of frauds to bind, though not a party thereto.

S. C. The substance of the statute of frauds being complied with in the material parts, the forms have never been insisted upon where an agreement has been reduced to a certainty.

52. The court of Chancery has, in many cases, considered an agreement as out of the statute of frauds, in which there is no danger of fraud or perjury.

53. Plea of statute of frauds to discovery of a parol agreement is not allowed, where part of the agreement is performed.

54. Although an agreement is not reduced into writing and signed by the party, yet it is well known, that if confessed or in part carried into execution it will be binding on the parties, and carried into further execution by the court.

55. *A.* agrees by parol with *B.* for the purchase of lands. *B.* delivers a rent-roll, which was dated and altered in his own hand-writing, and shewed by the title of it, that an agreement had been made between them for the sale of the estate at 21 years purchase. An abstract of the title was also delivered to *A.*, together with the deeds, in order to be compared with the rent-roll. *B.* likewise wrote letters to several of his creditors, informing them, that he had contracted with *A.* for the sale of his estate at 21 years purchase, and sent the tenants to treat with *A.* for a renewal of their leases. Notwithstanding all these circumstances, upon *A.*'s filing a bill for a specific execution of this agreement. *B.* pleaded the statute of frauds in bar to both the discovery and relief, and the plea was allowed.

56. Yet, under some circumstances, a mere parol agreement is binding, and will be carried into specific execution by a court of equity.

57. The rule, that a parol agreement ought not to be admitted to contradict the terms of an agreement in writing, is generally true; but it is also true, that a written agreement may be waived or varied by a subsequent parol agreement.

58. If there be general instructions for an agreement consisting of material circumstances to be hereafter extended more at large, and to be put into the form of an instrument, with a view to be signed by the parties, and no fraud, but the party take advantage of the *locus pœnitentie*, he shall not be compelled to perform such agreement if he insists upon the statute of frauds.

H. 1789, cor. Thurlow, C.
Whitchurch v. Bevis,
2 Bro. Ch. Ca. 559. 1 Eq. Abr. 21.
Vide Child and Godolphin, in
1723. *Whaley v. Bagenal*,
6 Bro. P. C. 45. *Cottingham*
v. Fletcher, 2 Atk. 155. Lord
Aylesford's case, *contra*, 2 Stra.
783. *Mitf. on Pleadings*, 2 ed.
pl. 210.

59. Plea of the statute of frauds to an executory contract over-ruled.

T. 1790, cor. Thurlow, C.
Rondeau v. Wyatt,
3 Bro. Ch. Ca. 154.

60. Parol agreement for a settlement upon marriage cannot be sued on afterwards, on ground of part-performance; but no case of a settlement reciting an agreement before marriage is within the statute.

T. 1790, cor. Thurlow, C.
Dundas v. Dutens,
1 Ves. jun. 199.
Vide Lady Montacute v. Maxwell, 1 P. Wms. 620.

Refusal after marriage to perform a previous agreement to settle, is a fraud against which equity will relieve.

61. Defendant having acknowledged by letter an agreement for sale of an estate, takes it out of the statute of frauds.

T. 1790 and T. 1791, cor.
Thurlow, C.
Tawney, Knt. v. Crowther and
another, 3 Bro. Ch. Ca. 161. 318.

62. Part-performance of a parol agreement takes it out of the statute of frauds. The construction is the same both at law and in equity.

31 May 1791, cor. Buller, J.
abf. C.
Brodie v. St. Paul,
1 Ves. jun. 333.

63. Putting a deed into the hands of a solicitor, to prepare a conveyance to a son-in-law after marriage, not a part performance of a parol agreement so as to take it out of the statute of frauds.

M. 1791, cor. Thurlow, C.
Redding v. Wilkes,
3 Bro. Ch. Ca. 400.

64. An agreement for the sale of lands and chattels, if void as to the land by the statute of frauds, is void *in toto*.

H. 1791, in Scacc.
Cook v. Tomb, Anstr. 420.
Vide Lea v. Barber, Warwick
Summer Assizes, 1794, 2 Anstr. 425. N.

S. C. Both parties giving instructions to an attorney to prepare a conveyance of land, and the vendor delivering to him a particular of the estate, signed by himself, as instructions for the deed, which was accordingly prepared, does not take the case out of the statute; there must be a part execution of the substance of the agreement itself.

Vide *Hawkins v. Holmes*,
1 P. Wms. 770. *Whitchurch*
v. Bevis, 2 Bro. Ch. Ca. 564.
Whaley v. Bagenal, 6 Bro. P. C.
45.

S. C. A paper, signed by the vendor on the first treaty, will not take the case out of the statute, where the bargain was concluded upon a subsequent treaty, and for a different price.

Vide *Tawney v. Crowther*,
3 Bro. Ch. Ca. 161.

65. Bill by the tenant of a farm for a specific performance of a parol agreement for a new lease, stating

24 May 1797, cor. Loughb. C.
Hills v. Stradling, 3 Ves. jun. 378.
Vide *Whaley v. Bagenal*,
6 Bro. P. C. 45.

stating improvements made at a considerable expence, and continuance of possession after the expiration of the old lease, and payment of an increased rent under the agreement; plea of the *statute of frauds* ordered to stand for an answer, with liberty to except.

15 Feb. 1798, cor. M. R.
Forster v. Hall, 3 Ves. jun. 712.
 In this case his Honour said,
Tawney v. Crowther, 3 Bro.
 Ch. Ca. 161. 318. *O'Hara v.*
O'Neil, 2 Bro. P. C. 39. are
 very strong authorities for raising
 drafts from letters.

See report of
Forster v. Hall
on appeal to
Lord Ch. Lang-
borough &c. &c.
Jan. 300.

66. The court has gone rather too far in permitting part performance and other circumstances to take cases out of the statute of frauds, and then unavoidably perhaps, after establishing the agreement, to admit parol evidence of the contents of that agreement. Part performance might be evidence of some agreement, but of what must be left to parol evidence. The remedy ought to rest in compensation. A man having laid out a great deal of money, does not prove he is to have a 99 years lease; he must bring his action for the money.

See more under *Deeds, Fraud, Landlord and Tenant, Plea, Purchase, Stock.*

Sec. 6. How far Equity will decree the Performance of a Voluntary Agreement, and particularly as against Creditors.

P. 1691, Canc.
Moor v. Rycault, Prec. in Ch. 22.
 2 Eq. Abr. 51. c. 1. 478. c. 3.
Vide Gilb. Ch. 275. Prec. in Ch.
 301. 2 Atk. 417. 2 Stra. 738.

1. A Husband who had made no provision for his wife, whom he had stolen, agrees that her fortune, which was considerable and in trustees hands, should be laid out in a purchase of lands, to be settled on them and the heirs of their bodies. This agreement, though accompanied by a judgment, and after marriage, *not to be considered as voluntary*, so as to be set aside in favour of a creditor of the husband.

H. 1696, cor. Somers, C. S.
Wentworth v. Devergingy,
 Prec. in Ch. 69.
 2 Eq. Abr. 51. c. 2.

2. A. makes a voluntary settlement on B., who after agrees to deliver it up without consideration: this agreement shall not bind in equity, for a voluntary settlement may be surrendered voluntarily.

15 Jan. 1702, Dom. Proc.
Powell & Ux. v. Pleydell,
 1 Bro. P. C. 5. 18 Vin. 118. c. 5.
 2 Eq. Abr. 682. c. 1.

3. A. voluntarily agrees to give certain houses to his niece and the heirs of her body, after the death of himself and his wife, in case they should leave no issue; but no conveyance was executed by A., though he lived above twenty years afterwards. In the mean time A. becomes indebted by mortgage,

gage, judgment, &c. and by his will devises all his estate, both real and personal, to his wife. This agreement is not good against a purchaser for valuable consideration, although he *had notice*, by being a *subscribing witness* to it.

4. Equity will not carry a voluntary covenant beyond the letter.

T. 1715, cor. Cowper, C.
Basse v. Grey, Bart. 2 Vern. 693.

5. Where money is agreed to be laid out in land, though the agreement be voluntary, equity will enforce an execution thereof in favour of the heir.

T. 1723, cor. Macclesfield, C.
Edwards v. County of Warwick,
2 P. Wms. 171.
2 Eq. Abr. 42. pl. 3.
Vide Lingen v. Sowray, 1 P. Wms. 172.

6. Equity will in no case decree a specific execution of a voluntary agreement.

H. 1727, cor. King, C.
Brownsmith v. Gilborne,
2 Stra. 738.
Vide Thornton v. Barnard, 2 Ld. Raym. 991.

7. Feme seised of a copyhold on marriage of her daughter to J. S., surrenders it to the use of J. S. and his intended wife, and the heirs of their bodies, remainder to J. S. in fee. The marriage takes effect: the husband signs a writing, whereby he owns that the limitation of the remainder to him in fee was a mistake, being intended for the wife; and accordingly covenants to stand seised of this remainder in trust for the wife in fee. This not a mere voluntary covenant, and equity will compel the performance of it.

T. 1728, cor. King, C.
Randall v. Randall,
2 P. Wms. 464.
2 Eq. Abr. 27. pl. 31.
Vide Beard v. Nuthall, 1 Vern.
427. *Husband v. Pollard,* Feb.
1718, 19. *Wiseman v. Roper,*
1 Ch. Rep. 84. *Furfaker v.*
Robinson, Prec. in Ch. 475.

8. E. P. covenanted to convey all his lands (part being in mortgage) to himself and his wife for their lives, and to the heirs of the marriage; remainder to E. P. plaintiff's father, in tail male, who was a stranger both in blood and consideration, and having no issue*, (and his wife being dead,) devised the mortgaged premises to defendant, and died: plaintiff brought his bill to have the covenant executed in favour of him, but it was dismissed. Otherwise, if such covenant had been in favour of children, creditors, or on such other good considerations, for though the making of the agreement was *voluntary*, yet the motive inducing was valuable and good. So in favour of a purchaser, the seller after purchase being considered only as a trustee for the purchaser.

P. 1731, Canc.
Parry v. Hughes,
2 Eq. Abr. 54. pl. 12.

* *Quære*, If it was not the covenantor, who had no issue, and whose wife was dead, as stated in the text?

9. A voluntary agreement by a husband is good against his executors, though not against his creditors.

2 Aug. 1750, cor. Hardw. C.
Attorney General v. Wborewood d.
Wborewood v. Univ. Col. Ox. n.
1 Vef. 539.

M. 1789, cor. Thurlow, C.
Colman v. Sarrel,
 3 Bro. Ch. Ca. 12. 1 Ves. jun. 54.
Vide Williamson v. Coddington,
 1 Ves. 514.

10. Where a deed is not sufficient to pass the estate, but the party must come into equity, the court never executes a voluntary agreement.

See more under *Bonds, Debtor and Creditor, Deeds, Marriage Settlement, Seduction.*

Sec. 7. Agreement underhand privately.

P. 1684, cor. Guildford, C. S.
Fryten & al. v. Bladwell & al.
 1 Vern. 240.

1. **U**nderhand agreement to defeat an agreement made on marriage, set aside as fraudulent.

M. 1685, cor. Jeffries, C.
Redman v. Redman, 1 Vern. 348.
Vide Juston and Benson,
 2 Vern. 764.

2. Upon a treaty of marriage between *A.* and the daughter of *B.*, *A.* being indebted 200*l.* by bond, *B.* would not consent to the match; to remove which objection the brother of *A.* takes up *A.*'s bond, and gives his own in the room of it, and privately takes a counter-bond from his brother to indemnify him; and the daughter of *B.* is privy to this, and encourages it. *A.* dies; the wife takes administration, and was relieved against this counter-bond, though a party to the fraud. *A.* himself might have been relieved against this counter-bond.

M. 1687, cor. Jeffries, C.
Gale v. Lindo, 1 Vern. 475.
Vide 1 Vern. 348. 2 Vern. 764.
Note; It is a rule in equity, that where a son, without his parent's privity, gives a bond to refund any part of his marriage portion, it is void. 1 Salk. 156.

3. The brother adds 160*l.* to his sister's portion to make it up the sum desired, but takes bond from her privately to repay it: the husband and wife both die: bond is put in suit by the administrator of the brother against the administrator of the wife. Decreed to be delivered up as fraudulent.

T. 1688, cor. Jeffries, C.
Child v. Daubridge, 2 Vern. 71.

4. Tradesman failing compounds, but makes an underhand agreement with some of his creditors to pay them the whole. This is a fraud, and on a bill brought by him against some of the creditors, who refused to take the composition after the time of payment was passed, the court would not relieve the plaintiff.

M. 1699, Canc.
Gifford v. Gifford,
 1 Eq. Abr. 89. pl. 3.

5. A son in consideration of a marriage portion of 2500*l.* covenanted that his father would settle 300*l.* *per ann.* on his wife as a jointure, and the father settled it accordingly. The son gave a bond to leave his wife 1000*l.* if she survived him. The son died, and the father pretended the wife ought not to have any benefit of this bond, for it was a fraud on the marriage agreement. The court

distinguished this from the case of * *Butler and Chancey* cited, for here the son only is a party to the articles, (and not the father,) and he might give all the portion if he pleased. Decreed there should be no relief.

* Cited in D. of Hamilton v. Mohun, 1 P.Wms. 121.

6. A widow on the marriage of her son agrees to release her jointure that he may make a settlement, and the son privately agrees to assign a leasehold estate to his mother. This agreement of the son set aside as fraudulent.

M. 1704, Canc.
Lamlee v. Haman & Ux.
2 Vern. 466.
Vide *Kyte and Coventry*, Sir R.
Butler v. Sir Hen. Chancey.

S. C. A. having jointure in part, and 10 l. per ann. charged on other part of her son's estate, upon the marriage of the son, joined in the settlement and accepted 15 l. per ann. in lieu, but privately the day before takes security from her son for 10 l. per ann. more out of a leasehold estate, which was not comprised in the son's marriage settlement, and the son covenants to pay it. A. after the death of her son brings an action of covenant against his widow and administratrix for non-payment of the 10 l. per ann. on a bill to be relieved against the action. Decreed for the plaintiff.

2 Vern. 499, 500.
1 Rol. Abr. tit. Marriage.
Peyton v. Bladwell, 1 Vern.
Ca. 233. *Redman v. Redman*,
1 Vern. Ca. 344. *Gale v. Lindo*,
1 Vern. Ca. 464.

8. C. That which is the open and public treaty and agreement on marriage, shall not be lessened or infringed by any private agreement.

7. A. intrusted by B. to receive interest on tallies, receives the principal and fails, and afterwards compounds with his creditors, but B. would not come in without having a greater composition than the rest, which A. agrees to give. A. brings a bill to be relieved against this underhand agreement, but he having been guilty of a great fraud and breach of trust, and having agreed to make some satisfaction, the court would not relieve him, but dismissed the bill.

H. 1707, cor. C.
Small v. Brackley, 2 Vern. 602.

8. It was a rule laid down in equity, that where the son, without the privity of father or parent treating the match, gives a bond to return or refund any part of the portion, it is void.

M. 1707, cor. Cowper, C.
Kemp v. Coleman, 1 Salk. 156.
Note; Any private agreement or treaty infringing the open and public agreement of marriage is considered as fraudulent: *Peyton*

v. *Bladwell*, 1 Vern. 240. *Redman v. Redman*, 1 Vern. 348. *Gale v. Lindo*, 1 Vern. 475. *Lamlee v. Haman*, 2 Vern. 499. *Keate v. Allen*, 2 Vern. 588. *Webber v. Farmer*, 2 Bro. P. C. 88. *Morrison v. Arbuthnot*, 1 Bro. Ch. Ca. 548. n. *Pitcairne v. Ogbourne*, 2 Vef. 375.—“ In *Neville v. Wilkinson*, before Lord Thurlow, in Nov. 1782, his lordship said he would not lay it down as a rule that “ fraud in cases of this nature must be upon an article expressly contracted for, but any representation “ misleading the parties contracting on the subject of the contract, was within the principle of the “ other cases; and his lordship relieved by injunction against a bond entered into by the plaintiff to the “ defendant before the plaintiff's treaty of marriage; the defendant having, by the plaintiff's desire, “ upon the occasion of such treaty, misrepresented to the wife's father the amount of the plaintiff's “ debts; and particularly concealed from him the bond in question; and this relief was given, although “ it did not appear there was any actual stipulation on the part of the wife's father in respect of the “ amount

“ amount of the plaintiff's debts.—*Vide etiam* Key v. Bradshaw, 2 Vern. 102. Woodhouse v. Shep. ley, 2 Atk. 535. Blanchett v. Forster, 2 Vef. 264. Montefiori v. Montefiori, 1 Bl. Rep. 363. “ Jackson v. Duchaire, 3 Term Rep. 551.” The above is a note by Mr. Cox to the case of Roberts v. Roberts, 3 P. Wms. 74.—In Turton v. Benson, 1 P. Wms. 496. it was held, that a private bond to pay back part of the portion was void, notwithstanding it had been assigned for the benefit of creditors. The party to any such private agreement is entitled to be relieved against it, as appears from most of the cases.—In Peyton v. Bladwell it was held, that a release procured after marriage from the husband, by the person who had agreed to settle an estate on him, was void.—In Roberts v. Roberts, upon the son's marriage, there was a power to the father to settle a jointure upon any woman he might afterwards marry, paying 1000*l.* to the son. Upon the father's marrying, the son was prevailed upon by him to release the 1000*l.* and to notify such release to the friends of the father's intended wife, the father giving a private bond for paying the same. The court refused to relieve against this bond, as the release was in fraud of the first marriage.—Most of the cases on this subject are fully stated in *Powell on Contracts*, 2 vol. 163 to 177.

P. 1710, cor. Cowper, C.
Duke of Hamilton v. Lord Mohun,
1 P. Wms. 121. *Salk.* 158.
10 Mod. 447. Cited 2 Vern. 652.
Gilb. 297. 1 Eq. Abr. 90. pl. 6.
Vide Butler v. Chancey,
1 Eq. Abr. 89. cited.

It does not appear that this decree was ever appealed from; but in Bro. P. C. 54. is a report of another branch of this cause, from which defendants appealed, and the decree was reversed.

The cases in which courts of equity will relieve against unequal contracts on principles of public policy, arising either from the subject-matter of the contract, or the relative situations of the contracting parties, are stated by Mr. Cox, in a note to *Osmond v. Fitzroy*, 3 P. Wms. 131.

The following decisions have taken place on points similar to that in the text: *Pearce v. Waring*, cited in *Hylton v. Hylton*, 2 Vef. 547. The defendant having been guardian to A., by A.'s directions, immediately upon his coming of age, invested a considerable sum of A.'s money in the purchase of stock in the defendant's name, which A. soon after confirmed to the defendant by deed of gift. The deed was set aside. So in *Hylton v. Hylton*, where the defendant was acting executor in a will under which the plaintiff was entitled to considerable property, and soon after the plaintiff's coming of age he granted to the defendant an annuity of 60*l.*, gave him a general release, and two written discharges, upon his delivering up several papers. The court set aside the grant, and directed a conveyance and account. The same principle is applied to transactions of other persons, between whom a similar confidence has existed as in the beforementioned case of *Osmond v. Fitzroy*, where the defendant, having been employed as servant to attend upon A., then an infant about seventeen, to prevent his being imposed upon, and continued in A.'s service afterwards, when A. was about twenty-seven years of age, prevailed upon him to give a bond, which was kept secret from A.'s friends, and there were some proofs of the weakness of A.'s capacity. *Griffin v. Devenille*, cited in Mr. Cox's note to *Osmond v. Fitzroy*, where the plaintiff lived some time before he came of age with his sister and her husband, and the court set aside securities obtained from him by them on his coming of age. The following cases have been decided on the same ground between parent and child: *Gliffin v. Okeken*, 2 Atk. 258. 3 Bro. P. C. 560. *Young v. Pear*, 2 Atk. 266. *Cocking v. Pratt*, 1 Vef. 400. *Hawes v. Wyatt*, 3 Bro. Ch. 156.

M. 1718, cor. M. R.
Turton v. Benson, 1 P. Wms. 496.
2 Vern. 764. *Gilb.* 288.
1 Eq. Abr. 45. pl. 5. 88. pl. 2.
Proc. in Ch. 522. 10 Mod. 445.
1 Sira. 240.

Vide Roberts and Roberts,
3 P. Wms. 66. and Mr. Cox's notes thereon; *et vide* Hill v. Caillovel, 1 Vef. 122. as to the point of assignment,

M. 1721, cor. M. R.
Middleton v. Lord Onslow and others, 1 P. Wms. 768.
2 Eq. Abr. 254. pl. 2. 259. pl. 2.
Vide Spurrett v. Spiller, 1 Atk. 105. E. of Chesterfield v. Janfen, 2 Vef. 156. Cockshot v. Bennett, 2 Term Rep. 763.

9. The father covenants to settle an estate on the marriage of his son, who privately agrees to pay so much out of it to his father, equity will relieve against this private agreement. No difference between such a covenant and a marriage brocage bond.

10. A son on his marriage is to have 3000*l.* with his wife, and privately agrees to pay back 1000*l.* to his wife's father by a bond in seven years: this is void in equity, and an assignment to creditors does not make it better.

11. A wife with the consent of her trustees agrees to pay a composition to her husband's creditors, and the court orders part of the trust-money to be so applied: any partial note of the husband to a creditor beyond the composition will be set aside.

12. *A.* treated for the marriage of his son, and in the settlement on the son there was a power reserved for the father to jointure any wife with whom he should marry in 200*l.* *per ann.*, paying 1000*l.* to the son. The father treating about marrying a second wife, the son agreed with the second wife's relations to release the 1000*l.*, and did release it, but took a private bond from the father for the payment of this 1000*l.* Equity would not set aside this bond, because it would be injurious to the first marriage, which being prior in time was to be preferred.

Redman v. Redman, 1 Vern. 348. *Gale v. Lindo*, 1 Vern. 475. *Keare v. Allen*, 2 Vern. 588. *Webber v. Farmer*, 2 Bro. P. C. 88. *Morison v. Arbuthnot*, 1 Bro. Ch. Rep. 548. (n.) *Pitcairne v. Ogbourne*, 2 Vef. 375. Not a general rule that fraud in cases of this nature must be upon an article *expressly contracted for*, but any representation misleading the parties contracting on the subject of the contract, is within the principle of the other cases; *vide Neville v. Wilkinson*, 1 Bro. Ch. Rep. 543. *Key v. Bradshaw*, 2 Vern. 102. *Duke of Hamilton v. Lord Mohun*, 1 Vern. 118. *Woodhouse v. Shepley*, 2 Atk. 535. *Blanchett v. Foster*, 2 Vef. 264. *Montefiori v. Montefiori*, 1 Bla. Rep. 363. *Jackson v. Duchave*, 3 Term Rep. 551. Most of the cases on the subject are fully stated in *Powell on Contracts*, 2 vol. 163 to 177.

See more, tit. Bond, Fraud, Marriage.

T. 1730, cor. Jekyll, M. R. *Roberts, Esq. & Ux. v. Roberts, Esq.* 3 P. Wms. 66.

Vide cases of direct marriage brokerage. *Arundel v. Trevillian*, 1 Ch. Rep. 47. *Drury v. Hooke*, 1 Vern. 412. *Smith v. Bruning*, 2 Vern. 392. *Stribblehill v. Brett*, 2 Vern. 446. *Smith v. Aylewell*, 3 Atk. 566. *Cole v. Gibson*, 1 Vef. 503. *Vide Shelly and Martin*, in Scacc. 14 Nov. 1779. Private agreements infringing the open agreements are fraudulent; *vide Peyton v. Bladwell*, 1 Vern. 240.

Lamlee v. Haman, 2 Vern. 499.

American Loyalist.

A—c

A Creditor, having it in his power to obtain warrants for payment of an *American* loyalist's debt out of his estate there, is bound, on being referred to that property by the debtor, to make it available as far as he can: but where the creditor is not informed of that property, no laches can be imputed to him; he therefore shall not be restrained by injunction from prosecuting his suit here, although the debtor shall have liberty to make use of the creditor's name to obtain the warrants to make them available as far as may be.

H. 1790, cor. Thurlow, C. *Peters v. Erving and others*, 3 Bro. Ch. Ca. 54.

Amendment.

A—c

1. A Mistake in the title of an order amended, though to charge a surety that gave a recognizance to abide the order of hearing.

T. 1700, cor. Wright, C. S. *Spearing & Ux. v. Lynn*, 2 Vern. 376. 1 Eq. Abr. 30. pl. 6. *Proc. in Ch.* 115.

Note; It was insisted this ought not to charge the surety, and cited the case of *Northcot and Northcot*, Colles' P. C. 287, and 4 Vin. 477. 7 Vin. 398. 8 Vin. 299. *Contra*, cited Earl and Earl.

2. The

P. 1702, cor. Wright, C. S.
White v. Taylor, 2 Vern. 435.

1 Eq. Abr. 30. pl. 7.

Sed quere, for this seems only a mistake of the clerk, whose errors are frequently amended, the better to carry on the justice of the court.

T. 1718, in Scacc.

Rex v. Archbishop of Canterbury,
Bunb. 24.

Vide Bromley's case, Lane 90.

H. 1719-20, in Scacc.

Kennett qui tam v. Lloyd,
Bunb. 58, 59.

M. 1719, in Scacc.

Baldwin qui tam v. —,
Bunb. 49.

Vide 1 Salk. 325.

M. 1721, in Scacc.

Rex v. Powell, Bunb. 83.

Cases to prove that writs without a teste shall abate: Latch, 11. Shore, 85. Salk. Tutchin's case.

2. The plaintiff's christian name being mistaken in the title of the interrogatories, the depositions could not be read, nor would the court permit the title to be amended, though most of the witnesses since the examination were gone to sea.

3. The court refused to amend an estreat, where there was nothing to guide the court to amend the estreat by.

4. The indenture of appraisement was dated before the writ of appraisement, which was before the appraisers had any authority, yet the court seemed to think it amendable.

5. An information of seizure amended by altering the day on which the seizure was stated to be made.

6. An extent amended where the month was omitted in the teste.

1 Sid. 304. 2 Jo. 83. 1 Lev. 2. Cro. El. 592. 2 Salk. 700. T. Jo. 41.—Montague, B. said, that judicial writs only are amendable, because there is a record to amend them by.

H. 1727, in Scacc.

Wickens v. Pratt, Bunb. 246.

7. The court will not give leave to amend or add an exception.

P. 1728, in Scacc.

Sir John Rous v. Barker & al.
Bunb. 251.

Vide 3 Mod. 100. 1 Sid. 259.

8. The return of a commission to ascertain the lands of a manor ordered to be amended by the commissioners.

P. 1728, in Scacc.

Edgell qui tam v. Decker, Bart.
Bunb. 252.

Vide Salk. tit. Amendment, pl. 3. 10.

9. An information of seizure of a ship upon the act of navigation amended.

T. 1730, in Scacc.

Attorney-General v. White,
Bunb. 283.

10. A special verdict on information was amended by the minutes after one argument.

M. 1731, cor. King, C.

Griells v. Gansell, 2 P. Wms. 646.
2 Eq. Abr. 59. pl. 6.

11. A deposition of a witness amended after publication.

M. 1732, in Scacc.

Rex v. Ward, Bunb. 323.

12. The court refused to amend a return to an inquisition on an extent.

H. 1733, in Scacc.

Brock qui tam v. Day, Bunb. 334.

The reporter says, though the court admitted a new offence could not be created by an amendment, yet they thought the present was only a mistake, and made the rule absolute.—*Quod mirum.*

13. Information of seizure amended, so as to make a new offence from what was first charged.

3 P. Wms. 315. n.

Vide 1 P. Wms. 412. Pengree
v. Jones, 2 Bro. Ch. Rep. 141.

14. A writ of error in no case amendable, and why?

15. The

15. The Attorney-General may, at any time, amend a revenue information.

Pr. 1796, in *Seacc.*
Attorney-General v. Henderson,
3 *Austr.* 714.

See more under *Answer, Bill, Writ.*

Answer.

A—e

Sec. 1. Where a Defendant is or is not bound (or permitted) to answer the Complainant's Bill.

1. *H.* was chief ranger of *Enfield Chase*, and now a bill was exhibited against him in the Chancery of the Dutchy for a discovery of what deer he had killed, and what timber he had cut down, and to shew cause why his patent should not be repealed. To this a prohibition was granted *nisi*; for he shall not be obliged to answer upon oath what may make him forfeit his place: it ought to be proved against him.

T. 1700, Dutchy Chamb.

Sir Basil Firebrass's case,
2 *Salk.* 550.

Note; A defendant may be protected from making a discovery which may subject him to any penalty or forfeiture, or any thing in the nature of a forfeiture, by demurrer, if the matter is apparent on the bill; or by plea, if it arises from extrinsic circumstances: as when, on an

insurance of goods to a foreign port, the bill prays discovery whether the goods did not consist of wool, which it is penal to export to such port, *Dimcall v. Blake*, 1 *Atk.* 52. So, whether goods were taken from the Indians by fraud, violence, or contrivance, *East India Company v. Campbell*, 1 *Ves.* 246; or, whether a bond was usurious, *Earl of Suffolk v. Green*, 1 *Atk.* 450; or, whether the defendant, at the time of her intermarriage with *A.* was married to another person, 3 *Bro. P. C.* 65. So, where a purchase of land is charged to be made from a person out of possession, which is contrary to stat. 32 *Hen.* 8. *Sharp v. Carter*, 3 *P. Wms.* 374. Whether the defendant procured subornation of perjury, *Baker v. Pritchard*, 2 *Atk.* 387. Whether a purchase was made from a papist, *Smith v. Read*, 1 *Atk.* 526. *Harrison v. Southcote*, 1 *Atk.* 528. 2 *Ves.* 389. Whether the party is an alien, on an information by the Attorney-General for lands in his possession, *Attorney-General v. Dupleffs*, cited 2 *Ves.* 494. *Vide Parker*, 144. Whether a person holds an office in trust for the defendant, which would vacate the defendant's seat in parliament, *Honeywood v. Selwin*, 3 *Atk.* 276. Whether the defendant was married to *A.*, and *B.* was her legitimate son by him, when she pleads that she had been previously married to *C.*, *A.*'s brother, in which case her marriage with *A.* would subject her to ecclesiastical punishment, *Brownfawnd v. Edwards*, 2 *Ves.* 243. Whether the defendant, after being instituted to *A.* had been instituted to two other livings, which would cause an avoidance of *A.*, *Boteler v. Allington*, 3 *Atk.* 453. Whether the defendant had married, so as to incur the forfeiture of an estate or legacy, *Monins v. Monins*, 2 *Ch. Rep.* 86. *Wrottesley v. Bendish*, 3 *P. Wms.* 235. *Cbauncey v. Tabourden*, 2 *Atk.* 392. *Cbauncey v. Fenboulet*, 2 *Ves.* 265. Or whether a tenant has assigned a lease, wherein there is a proviso that it shall be void on assignment. *Fane v. Altes*, 1 *Eq. Ca. Abr.* 77.

A defendant was compelled to answer a bill to discover a conspiracy or attempt to set up a child she pretended to have by a person who kept, and was desirous to have a child by her, *Cbeboynd v. Lindon*, 2 *Ves.* 450. To discover whether he was tenant for life, though he pleaded that he had made a lease for the life of another, which would be a forfeiture, *Weaver v. Earl of Meath*, 2 *Ves.* 108. To discover whether he has a legitimate son, as it does not tend to discover whether he cohabited with any woman, *Finch v. Finch*, 2 *Ves.* 491. To discover a second marriage, upon which an estate was limited over from the defendant, such limitation not being considered as a forfeiture, *Lucas v. Evans*, 3 *Atk.* 260.

Defendants are bound by covenants not to plead or demur to any discovery, on account of its subjecting them to penalties or forfeitures, *East India Company v. Atkyns*, *Com.* 346. 1 *Str.* 168. *Mof.* 74. *South-Sea Company v. Bamsted*, 1 *Eq. Ca. Abr.* 76.

If the forfeiture is waived by all who are interested therein, the discovery must be made, *Misford*, 158. *Vide Misf.* 157. 224. 1 *Vern.* 109. 129. 306. *Parker*, 144. 1 *Harr. Ch. Pr.* 7th edit. 378. *Bunb.* 192. *Hard.* 138. *Com. Dig.* cb. 3. (B. 2).

P. 1708, in Seacc.
Delove v. Bellamy,
 2 *Eq. Abr.* 66. pl. 1.
Vide Errington v. Attorney-General & al. Bunb. 303. where the Attorney-General was permitted to withdraw his general answer, and put in another, insisting on the particular rights of the crown.

M. 1709, cor. M. R.
Assn. 2 Eq. Abr. 70. pl. 7.

17 May 1721, in Seacc.
Phillips v. Winter, Bunb. 74.

H. 1722, in Seacc.
Cotes v. Turner, Bunb. 323.

H. 1732, in Seacc.
Price v. Lord Coningsby,
 Bunb. 324.

M. 1725, cor. King, C.
Richardson v. Mitchell,
 Sel. Ca. in Ch. 51.
 2 *Eq. Abr.* 378. pl. 8.
Vide Stephens and Stephens,
 cited in support of the exceptions.
Edwards and Freeman, Sel. Ca.
 in Ch. 51.
Vide post, f. 5. pl. 6. S. C.

2. Bill was brought against an auditor of the dutchy, who answers, "that he doth not know any thing that is prayed in the bill but as an officer;" resolved by all the barons, that he is not obliged to answer the bill, because every subject may have knowledge of it, paying the usual fees, and it is not charged in the bill that the defendant had any interest in the thing which is demanded, neither is it alleged that they hindered any person from searching.

3. Plaintiff's bill suggested that defendant had lent him money, and that he had trusted the defendant to compute the interest; that there was a miscomputation, and that plaintiff had paid more than was due; therefore the bill prayed that defendant might set forth how much interest was due, and how much was over-paid. Defendant pleaded the statute against usury as to legal interest. Per Master of the Rolls—The defendant shall not answer as to legal interest, but he shall answer to what he did receive more than the interest; for shall not a mortgagor have a bill against the mortgagee to account and discover how much he hath received more than the interest and principal? which is the same case with this. The plea was over-ruled as to all but the words legal interest.

4. Where time is given, or commission to answer without more, the defendant cannot demur, or plead and answer.

5. Where a plea or demurrer is over-ruled upon hearing, and defendant answers, (though by denying combination only,) defendant is not obliged to put in a further answer until plaintiff has put in exceptions for that purpose; but if the demurrer is to the whole bill, and over-ruled, defendant must answer according to the rules of the court, without exceptions put in by the plaintiff.

6. If a bill be filed, but no process taken out upon it, and afterwards a cross bill be filed, the plaintiff in the original bill cannot compel the defendant to answer his bill first.

7. A bill brought to set aside a purchase, and to have a discovery of the scite and profits of the estate. Defendant by answer insists, that he is a purchaser, and that he is not obliged to make a discovery. To which exception was taken for want of answering, and allowed; Lord Chancellor being

§ 1. *Where Defendant bound to answer.*

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being of opinion, that the defendant having answered, the charge of the bill must be fully answered.

8. After a bill is taken *pro confesso*, the defendant is not permitted to answer.

P. 1731, in Scacc.
Hughes v. Owen, Bunb. 299.

9. Upon the marriage of P. and G., lands were settled to the use of the husband and wife for their lives, and the life of the survivor of them; then to the use of the first and every other son in tail male, remainder to the right heirs of the husband. The marriage took effect, but the husband died in the lifetime of the wife without leaving any issue, having devised all his lands to his wife and her heirs. In 1730, the wife devised all her real estate to the defendant, subject to a few legacies, but lived and died a Papist; that being difficult to prove at law, the plaintiff, who had married Elizabeth the heir at law to P., and his wife filed their bill against the defendant to set aside the marriage settlement and will of P., under which his widow G. claimed: and in particular prayed, that the defendant might discover whether G. the widow, under whom the defendant claimed, was a Papist or not. As to so much of the bill as sought a discovery whether G. was at any time, and how long before her marriage with P., a Papist, and whether she had continued so till her death, and whether as such she was incapable and disabled by law to purchase: the defendant pleaded the deeds of settlement made upon the marriage of P. and his wife, and also the will of P., under which his wife claimed; as also the will of G., under which the defendant claimed: and further, that by the act made the 11 & 12 W. 3. sec. 4. it was amongst other things enacted, That every Papist, or person making profession of the Popish religion, should be disabled, &c. *Per cur.*—As G. could not be obliged to discover whether she was a Papist or not, so likewise the defendant who claimed under her could not; and in that respect there was no difference between the party herself and the person who derived title from her. Plea allowed.

19 Mar. 1736, cor. Hardw. C.
Smith v. Read,
2 Eq. Abr. 379. pl. 10.
8 Vin. Abr. 540. pl. 21.
Vide Com. Rep. 665. S. C.
cited in *Jones v. Meredith*.

10. The plaintiff's bill set forth, that J. S. died seised of lands of 100*l.* per ann., leaving issue only one son A. and three daughters, B., and C., and D., since married to W. (a Protestant), who are the defendants; and the plaintiff married Mary the only sister of J. S., and who, on failure of issue of the said J. S., was his heir at law; that A. the

P. 1739, in Scacc.
Jones & Ux. v. Meredith & al.
2 Eq. Abr. 379. pl. 12.
Com. Rep. 661. Bunb. 346.

son entered and died seised; that his sisters *B*, *C*., and *D*. were educated in the Popish religion, whereby the plaintiff *Mary* their *aunt*, being the next Protestant kin, was entitled to enjoy the rents and profits of the estate by virtue of the *stat. 11 & 12 W. 3.* until the defendants should take the oaths and conform: that the plaintiff brought an ejectment, but *Roberts* (another defendant to the bill) caused himself to be added a defendant in the said ejectment, and insisted on a mortgage of the said estate, made to him by the other defendants for a term of years, for security of 40*l.*; therefore the bill prayed a discovery, whether *J. S.* the father, and *A.* the son, did not die seised, and when? and that *Roberts* may discover whether *B*., *C*., and *D.* were not educated in the Popish religion, and now profess it? and whether they were not of the age of eighteen years and six months and upwards at the death of *A.* the son, or of what age? and whether they have not refused to take the said oaths, and are thereby incapacitated to hold the said estate? whether plaintiff *Mary* is not the next Protestant kin to the said *J. S.* and to the said *A.*, and also to the defendants *B*., *C*., and *D.*; and consequently by the said act entitled to the premises during such incapacity? and what incumbrance *Roberts* has, and that the plaintiff may redeem? &c. To such part of the bill as sought a discovery, touching the profession of the Popish religion by defendants and their conformity, defendants pleaded the said statute, in regard that such discovery might subject them to the penalties, forfeitures, or disabilities thereof. Plea allowed.

T. 1735, cor. Talbot, C.
Sbarp v. Carter and another,
 3 P. Wms. 375.
Vide 6 Mod. 656.

11. A defendant was not bound to answer what tended to accuse him of maintenance, or of buying pretended rights within 32 H. 8. c. 9.

16 Jan. 1744, cor. Hardw. C.
Selwyn v. Honeywood,
 9 Mod. 419.
Vide *Ashby v. White*, 1 Salk.
 19. 3 Salk. 17. 6 Mod. 45.

12. A defendant is not bound to disclose any fact which would subject him to corporal punishment, pecuniary penalty, or loss of office.

8 State Tr. 89. Holt, 524. 1 Bro. P. C. 45. Raft. Ent. 479.

18 Jan. 1749, cor. Hardw. C.
Savery v. Dyer, Amb. 70.
 1 Eg. Abr. 32.
 S. C. but not S. P.

13. Order for amendment of bill without costs, requiring no further answer, the amendment was, by praying an injunction: held, the defendant might answer *gratis*.

20 Mar. 1751, cor. Hardw. C.
Brownfword v. Edwards,
 2 Ves. 245.

14. No one is bound to answer, so as to subject himself to punishment.

15. Defend-

15. Defendant not compelled to answer so as to subject himself to ecclesiastical penalties, but must answer whether he has a legitimate son, not whether he is married or not, or whether he is an alien.

24 O&A. 1752, cor. Hardw. C. *Finch v. Finch*, 2 Ves. 493.

Note; Defendant must answer whether he is an alien or not upon an information exhibited for the king, and cannot demur to the discovery. Park. 144.

16. The rule of discovery by answer (unless subjecting to penalty) depends not on the rule of law.

3 July 1755, cor. Hardw. C. *Anon.* 2 Ves. 621.

17. A trustee in a will who released, and never acted, ought not to be a party in a suit to set aside the will, on the ground of fraud, and therefore need not answer as to the charges of fraud, in which he is not personally implicated.

T. 1792, in Scacc. *Richardson v. Hulbert and another*, 1 Anstr. 65.

18. Where the bill is amended after answer by adding a defendant, the original defendant cannot answer the amended bill, nor have any order for time to answer.

H. 1797, in Scacc. *Gill v. Matibrow*, 3 Anstr. 279.

See more under sect. 11. *post*, and also under *Alien, Bill, Demurrer, Exceptions, Forfeiture, Papist, Plea*,

Sec. 2. Of the Defendant's Application for Time to answer the Complainant's Bill: And herein of his Compliance with an Order for Time.

1. IF time be given for defendant to answer, though after sequestration, and though the answer be reported insufficient, yet the bill shall not be taken *pro confesso*.

M. 1720, cor. King, C. on Appeal from the Rolls.

Hawkins v. Crook, 2 P. Wms. 556. *Moj.* 294. 2 Eq. Abr. 178. pl. 4.

In *Davis v. Davis*, 2 Atk. 21 Lord Hardwicke said, that *the costs being paid to the plaintiff on the defendant's answer being reported insufficient, weighed materially with the court in this case, which is a circumstance Mr. P. Williams omitted in his report; and his lordship in S. C. further said, that this case is not determined upon satisfactory reasons; for receiving costs upon a Master reporting an answer insufficient, is by no means accepting it for an answer.*

Vide also, Lady Abergavenny v. Lady Abergavenny, 2 Eq. Abr. 179. pl. 5.

2. On time given to answer, a defendant may put in a plea, for that is an answer, and on oath, but cannot put in a demurrer.

M. 1730, cor. King, C. and Raymond, C. J. *Jones v. E. of Strafford & al.* 3 P. Wms. 81.

2 Eq. Abr. 253. pl. 11. *Vide Anon.* 2 P. Wms. 464. *Roberts and Hartley*, 1 Bro. Ch. Rep. 56.

Note; Contempts are not stayed by an order for time, unless so ordered. *Vide 1 Vera.* 104.

3. Where one out of several defendants obtained an order to plead, answer, or demur, but not to demur alone, and demurred to the bill as containing different matters, and inconsistent, and answered nothing more than the charge of combination

22 Mar. 1750, cor. Hardw. C. *Dene v. Peacock*, 3 Atk. 726.

Kide Hester v. Weston,
1 Vern. 463.

and confederacy only, *the court was inclined to think it was not answering pursuant to the order.*

S. C. Where a man demurs for that the bill contains several matters not relating one to the other, if he does more than deny combination and confederacy, he over-rules his demurrer.

P. 1779, cor. Thurlow, C.
Roberts v. Hartley,
1 Bro. Ch. Rep. 56. 1 Eq. Abr. 41.
* Otherwise of a demurrer, though only to part, and answer to the other part. *Kenrick v. Clayton,*
2 Bro. Ch. Ca. 214.

4. Putting in a plea * a sufficient compliance with orders for time to answer.

P. 1780, cor. M. R.
Lee v. Pascoe, 1 Bro. Ch. Ca. 78.
1 Eq. Abr. 41.
Vide Steventon v. Gardener,
2 P. Wms. 286. Sir J. D.
Goodyer v. Dean and Chapter of
Worcester, in Scacc. 1777.

5. Motion to discharge a demurrer (after motion for time to plead, answer, or demur, but not to demur alone) granted, the answer only denying combination.

Roberts v. Hartley, 1 Bro. Ch. Ca. 56. *Kenrick v. Clayton, ante.*

T. 1793, cor. Loughb. C. and
M. R.
Gordon v. Pitt,
4 Bro. Ch. Ca. 406.

6. Upon an application for an order for time to put in further answer after exceptions allowed, it was understood at the bar that the practice should be considered and regulated. In the present case it was granted.

Ordo Curie.
23 Jan. 1794, per Loughb. C.
and R. P. Arden, M. R.
4 Bro. Ch. Rep. 544.

7. The delay of defendants in putting in their answers being considered, *ordered*, that on a third application for time defendant do consent to enter his appearance with register within four days, consenting that the Serjeant at Arms shall go against him as on a commission of rebellion *non est inventus*, in case he does not put in his answer by the time granted: that on a second application for time to answer an amended bill, or after exceptions allowed, defendant do consent to same terms.

But not to preclude an application to the court under special circumstances.

See more under *Contempt, Demurrer, Exception, Plea, Process, Sequestration.*

Sec. 3. As to the taking of an Answer and Return.

M. 1682, Canc.
Penn v. Chisle, 1 Vern. 41.

1. ANSWER returned, and the indorsement of *executio ipsius brevis* omitted. The defect was supplied by these words in the return, viz. *copt. & jurat. &c. secundum effectum & tenorem commission. huic annex.*

2. A

2. A plea cannot be taken upon a general commission to take the answer only.

M. 1684, cor. North, C. S.
Lloyd v. Gunter, 1 Vern. 275.
1 Eq. Abr. 41. pl. 1.

3. The court obliged the plaintiff to accept an answer from *Tripoli* which had been ignorantly broke open on shipboard.

M. 1728, cor. King, C.
Hornby v. Pemberton, Mof. 59.

4. The joint and several answer of two defendants, under written *jurat*, and not *jurati* or *ambo jurati*, was suppressed for irregularity, on motion.

M. 1729, cor. M. R.
Anon. Mof. 238.

5. As well on commissions to take answers and pleas in the country, as before the Masters in Chancery, the commissioners shall see the defendants sign their answers or pleas.

27 April 1748, Hardwicke, C.
Ordo Curie, 2 Atk. 239.

6. Where a foreigner puts in an answer in his own language, a sworn translation must be filed with it.

T. 1791, Canc.
Simmonds v. Comptesse du Barré,
3 Bro. Ch. Ca. 263.

See more under *Commission, Plea.*

Sec. 4. Where an Answer may be put in without Oath; And herein of the Answer of a Corporation aggregate, or of a Jew, Infidel, or other Sectary.

1. **A** Jew ordered to be sworn to his answer on the Pentateuch, and the plaintiff's clerk to be present.

M. 1684, Canc.
Anon. 1 Vern. 263.

2. A peeress ordered to produce deeds, confessed in her answer on honour only, not on oath.

P. 1699, Canc.
D. of Hamilton v. Lady Gerard,
Prec. in Ch. 92.
2 Eq. Abr. 13. pl. 2.

Vide Prac. Reg. 7. Powell, M. R. v. County of Dorset, 2 Eq. Abr. 13. pl. 2. (n.) A peer puts in his answer on his honour, but as a witness he must be examined on oath. *Sir Thomas Meers v. Lord Stourton*, 1 P. Wms. 146.

3. *A.* beyond sea sues *B.* at law. *B.* brings his bill. The court will order service on the attorney to be good; but the attorney shall not put in an answer without oath. *Quare*, if defendant is in an enemy's country where no commission can go? *Vide* Commission.

M. 1718, cor. Parker, C.
Anon. 1 P. Wms. 523.

4. Where the suit was frivolous, a Quaker defendant was allowed to put in his answer without oath or affirmation.

H. 1721, cor. Macclesfield, C.
Wood v. Storey and another,
1 P. Wms. 781.
2 Eq. Abr. 67. pl. 2.

The like order is said to have been made by Lord Harcourt in Dr. Heathcote's case.

T. 1734, cor. Talbot, C.
Wych v. Meal, 3 P. Wms. 310.
 2 Eq. Abr. 68. pl. 3.

Vide Anon. 1 Vern. 117.
 where upon a bill against a corporation to discover writings, defendants answer under their common seal only, and will answer nothing to their prejudice. Ordered, that the clerk of the company, and such other principal members as plaintiff shall think fit, answer on oath, and that a Master settle the oath. *See* *vide* Moodamy and Morton, 1 Bro. Ch. Ca. 469.

4 Dec. 1739, cor. Hardw. C.
Ramkenseat & al. v. Barker
 & al. 1 Atk. 19. 21.

A heathen (not an alien enemy) shall be admitted to answer according to his own form of an oath. *Vide* Omychund v. Barker, 1 Atk. 21.

5. Where a corporation aggregate are defendants, they are not liable to a prosecution for perjury, though their answer be never so false.

6. The court directed a commission to the *East Indies* to take the answer of the defendant to the cross bill, who was of the *Gentoo* religion, and empowered two or three of the commissioners to administer the oath *in the most solemn manner, as in their discretion should seem meet*; and if they administered any other oath than the Christian, to certify to the court what was done by them; that, if there should be any doubt as to the validity, the opinion of the judges might be taken.

S. C. The court will not stay proceedings in an original cause till the answer come into a cross bill, but will only stay publication.—*Secus*, if cross bill brought *before* answer put into the original bill.

T. 1794, in Scacc.
Marsh v. Robinson, 2 Anstr. 479.

7. If one puts in his answer on affirmation without oath, as being a Quaker, the court will not inquire whether he is such, for he is concluded from denying that fact on an indictment for perjury in the answer.

See more under section 11. and also under *Alien, Baron and Feme, Corporation, Infant, Lunatic, Privilege*.

Sec. 5. Of a sufficient or insufficient Answer,

M. 1682, Canc.
West, Esq. v. Lord Delaware
 and another, 1 Vern. 74.
 1 Eq. Abr. 35. pl. 7.
Vide 2 Vent. 357.

1. ONE defendant's answer is reported insufficient, and the Master's report on exceptions confirmed; afterwards the other defendant puts in the like answer. The court for avoiding delay will judge of the insufficiency of the answer, without sending it to a Master.

M. 1685, Canc.
Darnel v. Rycney, 1 Vern. 344.
 1 Eq. Abr. 41. pl. 2.

2. Where a defendant answers to part, and pleads to the residue of the bill, the plaintiff cannot except to the answer till the plea is argued, or an order obtained that it shall stand for an answer, with liberty to except.

T. 1687, cor. Jeffries, C.
Hall v. Bouly, 1 Vern. 470.
 1 Eq. Abr. 35. pl. 5.

3. The defendant in his answer says, that to his remembrance he had received no more than the sum of ——. *Held* a good answer.

4. Where

4. Where a defendant obtained leave to plead answer and demur, but not demur alone, and answered only by denying, and demurred to every other part of the bill: held by Lord Chancellor, that he ought to answer some material fact of the bill, and the demurrer was discharged with costs.

1717, cor. Cowper, C.
Attorney-General v. ———
4 Vin. Abr. (W. 2), pl. 2.
2 Eq. Abr. 79. pl. 4.

5. Where the general traverse is omitted at the end of the answer, such answer is good, and not to be suppressed as improper.

M. 1722, cor. Macclesfield, C.
Anon. 2 P. Wms. 87.

6. If a defendant answers, he must answer the charge in the bill, though what he answers might have been good by way of plea.

10 Nov. 1725, Cane.
Richardson v. Mitchell,
Sel. Ca. in Ch. 51.
2 Eq. Abr. 67. pl. 5.

Vide Stephens v. Stephens, and Edwards and Freeman, Sel. Ca. in Ch. 51.

If a man gives a general answer, and a particular question be asked which is included in the general, yet he must answer it particularly, or else it may be demurred to, for that may be a matter of judgment; but a man is not obliged to answer any question which may subject him to a penalty. Nov. 17, 1725, Paxton's case, Sel. Ca. in Ch. 63. 2 Eq. Abr. 67. pl. 5.

7. Agreed *per cur.* that a defendant ought to sign his answer, or an injunction may be continued. — *Quere*, if plaintiff taking a copy of the answer does not waive that informality?

P. 1722, in Scacc.
Anon. Buns. 251.

8. If a process for contempt issues for want of an answer, and plaintiff accepts the costs of the contempt, they are purged; and if an insufficient answer is put in by defendant, plaintiff must begin his process *de novo*; but if he refuses the costs, and upon exceptions to the answer defendant is obliged to put in a further answer, plaintiff may go on with the process where he left off.

T. 1728, Cane.
Haistwill v. Grainger,
1 Eq. Abr. 351. pl. 7.
This seems to be agreeable to
the printed order of court.

9. Plaintiff resident in London filed a bill for a discovery, account, and injunction against defendant at Constantinople. Defendant sets forth by answer the particulars of all books, papers, and writings, and offers to produce them on oath at Constantinople to any person plaintiff should appoint, and to let him have copies. Lord Chancellor thought plaintiffs demand unreasonable, and defendant's offer sufficient, and directed that defendant should produce upon oath all books, papers, and writings to plaintiff's appointee at Constantinople, and that the affidavit should be settled by a Master, and sworn before the consul or ambassador abroad. The copies to be at plaintiff's charge.

M. 1728, cor. King, C.
Hornby v. Pemberton, Mosf. 52.

S. C. One partner files a bill against another partner abroad, to discover (*int. al.*) what consignments he had made to others in England. Defendant

defendant by his answer submits, that by what he had set out, plaintiff had broke the articles, and makes no discovery. This is insufficient; for if the question should be determined for the plaintiff, he is entitled to a discovery, which he would lose if defendant should die in the mean time.

M. 1729, cor. M. R.

Hawkins v. Crook,

2 P. Wms. 556. *Mof.* 294.

2 *Eq. Abr.* 178. pl. 4.

In *Davis v. Davis*, 2 *Atk.* 21.

Lord Hardwicke said, that *the costs being paid to the plaintiff on the defendant's answer being reported insufficient, weighed materially with the court in this case, which is a circumstance Mr. P. Williams omitted in his report; and his lordship in S. C. further said, that this case is not determined upon satisfactory reasons; for receiving costs on a Master's reporting an answer insufficient, is by no means accepting it for an answer.*

Vide Lady Abergavenny v. Lady Abergavenny, 2 *Eq. Abr.* 179. pl. 5.

M. 1730, cor. King, C. and

Raymond, C. J.

Jones v. E. of Stafford & al.

3 P. Wms. 81.

2 *Eq. Abr.* 233. pl. 11.

Vide Anon. 2 P. Wms. 464.

P. 1731, in Scacc.

Errington v. Attorney-General & al. *Bush.* 303.

13 June 1731, Cane.

Anon. *Sol. Ca. in Ch.* 5.

2 *Eq. Abr.* 69. pl. 7.

10. If time be given for a defendant to answer, though after sequestration, and though the answer be reported insufficient, yet the bill shall not be taken *pro confesso*.

11. On time given to answer, a defendant may put in a plea, for that is an answer, and on oath, but cannot put in a demurrer.

Roberts and Hartley, 1 *Bro. Ch. Rep.* 56. S. P.

12. The Attorney-General has leave to withdraw his general answer, and to put in another, insisting on the particular right of the crown.

13. When a defendant is in contempt for want of an answer, and an insufficient answer is put in, that is no answer at all; and the plaintiff is not to begin his process *de novo*, but go on regularly from the last process.

14. Plaintiff brought her bill for an account of profits, &c., and after defendant had fully answered, plaintiff amended her bill three times, to which defendant put in three several pleas and demurrers, which had been all over-ruled, and defendant stood in contempt to a sequestration for not answering the amended bill. Plaintiff now moved for liberty to set down the cause on the sequestration, in order that the bill might be taken *pro confesso*, because part was fully answered and denied; and the case of *Hawkins and Crook* was cited. But for plaintiff it was urged, that if defendant by answering part, and refusing to answer the most material point of all, should prevent the bill being taken *pro confesso*, that would put the plaintiff in a much worse condition than not answering at all, and would encourage defendants by this method to elude the justice of the court; and as to *Hawkins and Crook*, defend-

ant

M. 1731, cor. King, C.

Lady Abergavenny v. Lady Abergavenny, 2 *Eq. Abr.* 179. pl. 5

4 *Win. Abr.* pl. 1. *W. Kel.* 5.

A MS. report of S. C. states it thus: *J. S.* filed a bill against *B.*, to which *B.* put in answer; the bill was twice amended, and discovery of new matter required; *B.* pleaded and demurred in bar of such discovery, which being over-ruled, *B.* was in contempt to a sequestration for want of an answer; the sequestration had been executed a year ago, and now plaintiff moved that the bill might be taken *pro confesso*, alleging that by the practice of the court, whenever a defendant has appeared, and the process of contempt is carried to the end of the line, the bill may be taken *pro confesso*, or otherwise there would be a failure of justice when a

ant there was willing and desirous to put in a full answer, and which was at length the liberty given him by the court (a). Lord Chancellor (King) said, that this is an untrodden path; and as there are no precedents to direct, we must go upon the reason of the thing.

At law, after the party has appeared, and is in court, if he makes default (b), judgment is given for the whole demand; and if in trespass, &c. defendant pleads only to part, or says nothing to the residue, the plaintiff may take his judgment immediately for what is not answered; and courts of equity form their process upon the same plan when the party is in court, &c.; and it is a jurisdiction which seems absolutely necessary, and exercised by all courts; when they have the parties once before them, they should have it in their power to determine upon the right, &c. and therefore seemed strongly to incline that the bill should be taken *pro confesso*, quoad the particulars not answered. But defendant offering to answer by the next term, except as to matter of account, no order was made upon the main question.

and it is the party's own obstinacy to stand out and refuse making a discovery; and joining issue, &c. as to the rest, seems new, and introductory of great confusion in the proceedings. 4 Vin. Abr. 446. pl. 2. in S. C.—Another MS. report accords. (a) For the decree to take the bill *pro confesso* was reversed.

(b) The method in equity of taking a bill *pro confesso* is consonant to the rule and practice of the courts of law, where if the defendant makes default by *nil dicit*, judgment is immediately given in debt, or in all cases where the thing demanded is certain: but where the matter sued for consists in damages a judgment interlocutory is given, after which a writ of inquiry goes to ascertain the damages, and then final judgment follows.—Said in argument in *Hawkins v. Crook*, 2 P. Wms. 559.—2 P. Wms. 311, *Lady Abergavenny v. Lady Abergavenny*, is not S. P.

15. Taking exceptions to an insufficient answer, is tantamount to a demurrer at law upon an insufficient plea.

The case of *Hawkins v. Crook**, before Lord Chancellor King, 4 Geo. 2. was not determined upon satisfactory reasons; for receiving costs upon a Master's reporting an answer insufficient, is by no means accepting it for an answer.

S. C. Lord Hardwicke inclined to think that where there is an amended bill and no answer put in to it, the plaintiff is entitled to a decree *pro confesso*, abstracted from any proceedings in the original cause.

16. J. S. being indebted to B. in 1680 l. secured by a judgment, mortgaged his estate to D.; the judgment-creditor brings a bill against D. the mortgagee, and J. S. praying to be relieved against this

matter is inquired of which lies within the knowledge of the defendant, and of which the plaintiff can have no other discovery but by his oath. Objected, here was a sufficient answer to the original bill; and no precedent could be produced that where any part of a bill was answered, the residue might be taken *pro confesso*. But, per King, C. if an action at law be brought for several trespasses, and the defendant's plea goes only to a part, plaintiff may sign judgment as to all the rest; and here *pro tanto* of the amended bill that is not answered, it may be taken *pro confesso*. But adjourned. 2 Kel. 5. pl. 4. S. C. in *toridem* verbis.—A case was mentioned in *Seacc.* of the Corporation of *Helfton v. Robinson*, where, after an answer reported insufficient, and defendant refusing to put in any further answer, the whole bill was taken *pro confesso*, by the opinion of the whole court, delivered *seriatim*: and this was the opinion of the Master of the Rolls in *Hawkins v. Crook*, for that an insufficient answer is no answer;

and the opinion of a discovery; and the opinion of as to the rest, seems new, and introductory of great confusion in the proceedings. 4 Vin. Abr. 446. pl. 2. in S. C.—Another MS. report accords. (a) For the decree to take the bill *pro confesso* was reversed.

26 Jan. 1739, on Appeal, cor. Hardwicke, C. *Davis v. Davis*, 2 Atk. 24. 8 Vin. Abr. 423. pl. 35.

* 2 P. Wms. 556.

N. B. This matter was never determined; for the parties agreed to affirm the decree, and their agreement was made an order of court.

M. 1740, cor. Hardw. C. *Hinds v. Dod*, *Barnard*. 258, g. 2 Eq. Abr. 69. pl. 8.

this mortgage in respect of the judgment, *D.* at the time of the mortgage having had notice of the judgment, *D.* by answer denied, that at the time of entering up of the judgment he had any notice of it. This answer was reported to be insufficient; and then he answered again and said, that at the time of signing and entering up of the judgment, he had no notice of it. This answer was also reported to be insufficient; and on an exception being taken to this report, Lord Chancellor held that this second answer was insufficient, and the exception was allowed accordingly.

20 Dec. 1742, cor. Hardw. C.
Bennet v. Lee, 2 Atk. 487.
Vide S. C. on a petition for a
bill of review, 2 Atk. 529.

17. Lord Hardwicke doubted whether an infant can, before he comes of age, put in a new answer so as to rehear the cause over again; for if there should be a decree against him on the second hearing, he may with as much reason put in a third answer, which would occasion infinite vexation.

25 Mar. 1745, cor. Hardw. C.
Bildyard v. Cressy, 3 Atk. 303.

18. The original bill brought for discovery only, the amended bill prays relief. The answer to this, is to be considered as a part of the answer to the original bill, as much as if engrossed on the same parchment, and a part of the same record.

22 Dec. 1750, cor. Hardw. C.
Child v. Brabson, 2 Vef. 110.
Vide *Duport v. Ward*.

19. A defendant being in custody for want of further answer, is discharged upon putting in a further answer, and paying the costs of his contempt; but should that further answer prove insufficient, plaintiff may take up his process of contempt just where he left off.

24 Oct. 1752, cor. Hardw. C.
Finch v. Finch, 2 Vef. 491.

20. Defendant without excepting to the first report of insufficiency, not absolutely precluded from insisting on the same matter in second answer.

21 Nov. 1757, in Scacc.
Swain v. Young, Amb. 353.
1 Eq. Abr. 35.
Note; To this case the reporter makes a query.
Vide *Gethin v. Gale*, 24 Oct. 1739.

21. Bill for discovery of assets against an executor. If the title of the plaintiff lies in the knowledge of the defendant, and he denies it, he need not set out an account of assets; but where the right does not lie in his knowledge, though he deny it, yet he must set out an account of assets.

P. 1779, cor. Thurlow, C.
Roberts v. Hartley,
1 Bro. Ch. Rep. 56. 1 Eq. Abr. 41.
* Otherwise of a demurrer, though only to part, and answer to the other part. *Kenrick v. Clayton*,
3 Bro. Ch. Ca. 214.

22. Putting in a plea * a sufficient compliance with orders for time to answer.

30 Nov. 1779, cor. Thurlow, C.
Hepburn v. Durand,
1 Bro. Ch. Ca. 503. 1 Eq. Abr. 35.

23. Where sums are specifically charged in the bill to have been received by the defendant, he must

must answer specifically to them, and it is not enough to refer to a schedule of all sums received.

Mist. on Ch. Pleadings, 2 ed. p. 247.

24. Motion to discharge a demurrer (after motion for time to plead, answer, or demur, but not to demur alone) granted, the answer only denying combination.

P. 1780, cor. M. R.
Lee v. Pascoe, 1 Bro. Ch. Ca. 78.
1 Eq. Abr. 41.
Vide *Stevenson v. Gardiner*,
2 P. Wms. 286. Sir J. D.
Goodyer v. Dean and Chapter of
Worcester, in Scacc. 1777. *Roberts v. Hartley*, ante. *Kenrick v. Clayton*, 2 Bro. Ch. Ca. 224.

25. After an order that a bill be taken *pro confesso*, merely putting in an answer is not sufficient to set aside the order.

M. 1787, cor. Thurlow, C.
Williams v. Thompson & al.
2 Bro. Ch. Ca. 279. 1 Eq. Abr. 83.

26. Where a defendant has answered all the circumstances respecting his own interest, he shall not be compelled to answer further circumstances in the bill.

P. 1788, cor. M. R.
Newman v. Godfrey & al.
2 Bro. Ch. Ca. 332. 1 Eq. Abr. 35.
Vide *Dr. Steward v. East India*
Company, 2 Vern. 380. and
1 Eq. Abr. 40.

27. Defendant to a bill for a discovery and account objecting by answer, that he had no concern in the business, must answer fully, though such a plea would bar both discovery and relief. But if the fact is so, there cannot be a decree against him.

4 May 1791, cor. Thurlow, C.
Cartwright v. Hately,
1 Ves. jun. 292.

28. If a defendant submits to answer where he might plead or demur, he must answer fully.

H. 1792, cor. Thurlow, C.
Hall v. Noyes, 3 Bro. Ch. Ca. 433.
Vide *Newman v. Wallis*,
2 Bro. Ch. Ca. 143.

29. An agent, charged with personal fraud, must answer fully.

P. 1792, in Scacc.
Bulkeley v. Dunbar, 1 Anstr. 37.

30. Where a discovery is sought of a correspondence, if the defendants set forth *extracts* of letters, and swear that those are the only parts of the correspondence upon the subject, this is sufficient.

T. 1792, in Scacc.
Campbell v. French & al.
1 Anstr. 58.

31. Upon an application for an order for time to put in further answer after exceptions allowed, it was understood at the bar, that the practice should be considered and regulated. In the present case it was granted.

T. 1793, cor. Loughb. C. and
M. R.
Gordon v. Pitt, 4 Bro. Ch. Ca. 406.
Vide *Ordo Curiae*, ante, c. 2. pl. 7.

32. In an answer to a bill for tithes, it is sufficient if the plaintiff has notice of the general nature of the defence.

H. 1794, in Scacc.
Atkins v. Lord Willoughby de
Broke and others, 2 Anstr. 402.
Baker v. Atbill, 2 Anstr. 493.

33. Upon discovery of new matter in an account, the court will permit a supplemental answer after replication.

P. 1794, in Scacc.
Maggridge v. Hodgson,
2 Anstr. 443.

34. An

M. 1794, in Scacc.
Clarke v. Jennings, 2 *Anst.* 498.

34. An answer, insisting on a *modus* (for a place described only by a map annexed) in lieu of all tithes, or at least of tithe hay, is good.

T. 1795, in Scacc.
Bull v. Griffin, 2 *Anst.* 563.

35. Where the counsel's name to an answer has been forged, the court will not take the answer off the file, if an innocent plaintiff is likely to suffer by it.

28 June 1797, cor. Loughb. C.
Marg. of Donnegal v. Stewart,
 3 *Ves. jun.* 446.
Vide Sir James Cockburn and
 Sir Lawrence Dundas.

36. The answer need not set forth an account, where the ground, upon which it is prayed, is denied; as where the bill charged a dealing in pictures by commission, and the answer denied that, and stated, that the defendant sold them to the plaintiff in the course of his trade.

See more under *Demurrer*, *Exceptions*, *Plea*.

Sec. 6. Of an Answer scandalous and impertinent.

T. 1708, cor. Cowper, C.
Anon. 2 *Eq. Abr.* 68. pl. 1.
 * Or bill.

1. IF an answer* contains scandalous matter, it may be expunged upon motion, and the party that *slanders* shall pay costs. This was agreed by all, but the doubt was, whether this could be done at the hearing of the cause. Lord Chancellor said, he did not remember that it ever had been done; but said, he would expunge the scandalous matter if the plaintiff would not insist upon costs. The counsel not being satisfied, precedents were ordered to be searched.

T. 1723, cor. Macclesfield, C.
Croven v. Wright,
 2 *P. Wms.* 181, 182.
 2 *Eq. Abr.* 68. pl. 2, 3, & 4.

2. On an answer being reported not scandalous or impertinent, if the plaintiff except to the Master's report, he must shew specially wherein it is scandalous or impertinent.

S. C. Where a bill or answer is referred for scandal, and reported to be scandalous, if the Master has once expunged this scandal, the party cannot except, as it will not appear on record what that scandal was, and it was the party's own fault that he did not except to the report sooner.

M. 1725, cor. King, C.
Lady Abergoenny v. Lady Abergoenny, 2 *P. Wms.* 311.

2 *Eq. Abr.* 69. pl. 5. This was made a rule by Lord King, whereby an old rule of the court of Chancery was altered; but it is held otherwise in Scacc. *Vide* Woodward and Atley, Bunb. 304. marg. where it is said, that after an answer is come in it is too late to refer the bill for impertinence, but it is never too late to refer it for scandal.

Vide Anon. 2 *Ves.* 631. *Barnes v. Saxby*, 21 June 1792, in Ch. *Carick v. London*, 11 July 1792, in Scacc.

Note; Though an answer cannot be referred for impertinence, yet it may for scandal. *Vide* Ellison v. Burgess, H. 1729, cor. King, C.

4. If

§6. Scandalous and impertinent.

4. If the title of an answer reflects on the plaintiff, it is scandal, because it is not part of the defence, or can be put in issue.

M. 1728, cor. King, C.
Pett v. Pett, *Mif.* 46.
Vide 1 Vern. 107. *Nell.* 70.
fo. edit.

5. A bill is brought to be relieved against a stale bond as satisfied, and as evidence to prove it, the plaintiff charges that the defendant entered into a latter bond to him for money lent, and that the bond being lost, he filed a bill against the defendant for payment, and had a decree, in which cause he never insisted on being paid this bond. The defendant in his answer says, he does not believe the plaintiff lost the bond, but concealed or destroyed it, these words are scandalous, because they are not material to the defence.

M. 1728, cor. King, C.
Smith v. Reynolds, *Mif.* 708

6. A reference of an answer to the Master for impertinence, refused to be discharged, although not moved for till after notice of motion for dismissal of the plaintiff's bill for want of prosecution.

M. 1734, cor. Thurlow, C.
Kinworthy v. Allen,
1 Bro. Cb. Ca. 400.
Vide 2 Vef. 631. but a rule is
not there laid down on the sub-
ject.

See more under *Exceptions, Reference.*

Sec. 7. Where a Defendant may amend his Answer, or put in a new one.

1. Defendant by answer consenting that an award made by her father might be confirmed, prayed she might amend her answer, she having made oath that she never read the award; and that her answer was prepared by her father, who had wronged her in the award. Motion denied *per cur.*

P. 1702, cor. Wright, C. S.
Harcourt v. Sherrard & al.
2 Vern. 434. 1 Eq. Abr. 29. pl. 5.
Colles' P. C. 233. S. C.
fully stated, and decree affirmed
by the Lords.
Vide Pearce and Grove, *Amb.*
65. *Patterson and Slaughter*,
Amb. 292.

Note; One reason why the court denied this motion was (it appears), because the father was an arbitrator of defendant's own choosing.

2. An executor not permitted to amend his answer, by which he mistook the law and waived the benefit of the surplus, though he afterwards proved the testator intended he should have it.

M. 1715, cor. Cowper, C.
Rawlins v. Powell,
1 P. Wms. 300.
2 Eq. Abr. 438. pl. 29.
As to the effect of a concession
by an answer, vide Pearce and
Grove, *Amb.* 65. 3 Atk. 593. Vide *Matthews and Matthews*, 2 Vef. 637.

3. An answer may be amended before issue joined.

S. C. Answer of two arbitrators. Defendants read against a third defendant, party to the award.

H. 1724, in Scaec.
Mullins v. Simmonds & al.
Eunb. 186. 196.
Vide 1 Vern. 159.

4. Answer

H. 1727, in Scacc.

Berney v. Chambers, Bumb. 248.

This was refused in the case of *Wortley Montague v. —*, on the defendant's application to amend his answer by altering the day of payment of a modus, though issue was not joined, and the day set right in the cross bill.

M. 1727, cor. M. R.

Cumtels of Gainsborough v. Gifford, 2 P. Wm. 427.

Vide Prec. in Ch. 221.

Note; It appears by the registers book that this amendment was ordered upon hearing several precedents read of amendments in the material part of an answer.

M. 1729, cor. King, C.

Ann. Mos. 248.

4. Answer amended after issue joined, and a commission issued upon defendant's paying all costs since the answer, swearing his answer over again, and paying for a new commission.

5. An answer amended after hearing, and decree on affidavit of the solicitor and his clerk, that the mistake was in engrossing the answer from the draft, and the draft produced. The amendment was by changing the word *her* to the word *him*.

6. A purchase is made to the use of baron and feme and their heirs, and baron and feme join in a mortgage to the vendor to secure part of the purchase-money. The mortgagee files a bill of foreclosure, baron and feme answer jointly; the baron dies, and the wife moves to amend her answer, and insists that the mortgage did not bind her for want of a fine. But the motion was denied, because an answer is equal to a fine, and the mortgage is good in equity, the wife not pretending she was imposed on.

M. 1727, cor. King, C.

Holliday v. Nabb, Bumb. 323.

2 Eq. Abr. 60. pl. 8. (n.)

7. Bill for a discovery of defendant's title, and for an account of the rents, &c. Defendant swore that *he purchased the estate in 1676, and had continued in possession ever since, and received the rents and profits thereof*. Upon recollection he discovered, that, by agreement on the purchase, the vendor and his wife were to continue in possession, and receive the rents and profits during their lives, which they did until 1690, and defendant had ever since. Upon motion, *cur.* gave leave to answer in this particular, it being rather for plaintiff's benefit, and the defendant being ninety years of age.

3 May 1740, cor. Hardw. C.

Wbarton v. Wbarton, 2 Atk. 294.

Note; The particular circumstances here were, that defendant's marriage-articles were executed in Spain, where the custom is to deposit deeds in a place appointed, so that defendant could not produce them. She was therefore permitted to amend, *quoad* setting forth the custom.

8. The defendant prayed to amend her answer by adding a new fact; granted on the particular circumstances of the case.

S. C. When a defendant has mistaken a fact or date, the court will give him leave to amend his answer.

P. 1740, cor. Hardw. C.

Woodgate v. Fuller, Barn. 50.

2 Eq. Abr. 60. pl. 8.

9. Defendant moved for leave to amend his answer, by striking out particular words, and inserting

setting others in their room. Defendant made an affidavit of the mistakes in the answer, and which was corroborated by the *affidavit of another person*. Lord Chancellor—If there had been *only the defendant's affidavit*, I would not allow of the amendment; but as there is the affidavit of *another person* I will, and ordered accordingly.

10. The court will not allow a defendant to amend an answer by striking out of it the admission of a fact, by which the plaintiff would be deprived of the benefit of this evidence, especially as he does not swear he was surprised into it, or ill advised in setting it forth.

S. C. The party is not bound by an admission of a consequence in law, or a consequence in equity, for the court is to judge of the law.

11. To a bill claiming the remainder in fee after an entail spent. Defendant had put in his answer, insisting, that a fine had been levied by one of the remainder-men in tail, and claiming under him; but before replication, he petitioned to take the answer off the file and put in a new one, claiming under a purchaser for a valuable consideration without notice, and made an affidavit in support that this new title was not discovered till after he had put in his answer. The court would not suffer a new answer to be substituted, for that might take from plaintiff the benefit of admissions in the first answer. Ordered the answer to be taken off the file, and the new matter to be added, paying the costs of the application and of the amendment.

12. An answer shall not be amended after an indictment for perjury preferred, or threatened, in order to avoid the indictment.

Note; It might perhaps be otherwise if the matter prayed to be amended was clearly shewn to be a mistake. *Vide Vaux v. Lord Waltham*, 1 Bro. Ch. Ca. 419. (n.)

13. On exceptions to an answer, if the defendant means to submit to them, he must give notice thereof before he can file his amended answer.

14. The court will not give leave to amend an answer after replication, nor to file a supplemental answer, unless on there appearing sufficient reasons why the matter could not be inserted in the first answer.

Vide Mullins v. Simmonds, in Scacc. Bunb. 186. *ante*, pl. 3. *Berney v. Chambers*, Bunb. 248. *ante*, pl. 4. *Holliday v. Nabb*, Bunb. 50. *Countess of Gainsborough v. Gifford*, 1 P. Wms. 427. *ante*, pl. 5. *Sed vide Wortley Montague v. —*, where amendment was refused before issue joined.

25 June 1747, cor. Hardw. C. *Pearce v. Grove*, 3 Atk. 522, 3. Amb. 65. 1 Eq. Abr. 30. *Vide Harcourt v. Sherrard*, 2 Vern. 434. *Patterson v. Slaughter*, Amb. 292.

19 Dec. 1755, cor. Hardw. C. *Patterson v. Slaughter*, Amb. 292. 1 Eq. Abr. 30. *Vide Pearce and Grove, ante*. *Harcourt and Sherrard*, 2 Vern. 434.

M. 1784, cor. Thurlow, C. *Lord Verney v. Macnamara*, 1 Bro. Ch. Ca. 419. 1 Eq. Abr. 30.

M. 1792, in Scacc. *Anon.* 1 Anstr. 86. *Note*; It was admitted to be otherwise in the court of Chancery.

M. 1793, in Scacc. *Tennant v. Wilmore*, 2 Anstr. 362.

P. 1796, in Scacc.
Harris v. Daubery, 3 *Anst.* 717.

15. This court never permits an answer to be amended from the danger of perjury, but defendant had leave to file a supplemental answer.

Sec. 8. Where a Defendant shall have the same Benefit from his Answer as from a Plea, and where a Plea shall stand for an Answer.

M. 1693, cor. Somers, C.
Watkins v. Hatchett,
 1 *Eq. Abr.* 36. pl. 3.

1. Defendant pleaded himself a purchaser for a valuable consideration without notice, *as by the deed, &c. ready to be produced may appear*; and upon arguing the plea it was ordered to stand for an answer: and it being moved that defendant might leave the deed with his clerk in court for inspection pursuant to his offer, and though it was agreed that by this offer defendant had made the deed a part of his answer; Lord Chancellor would not bind defendant, being a purchaser, by the improvident offer in his answer.

20 July 1717, Canc.
E. of Clanrickard v. Burk,
 4 *Vin. Abr.* 422. (W. a), pl. 1.
 2 *Eq. Abr.* 79. pl. 2.
 2 *Bro. P. C.* 15.

Note; The lords ordered the plea should stand for an answer, with liberty to except.

2. It is a rule in equity that the answer overrules the plea, where defendant answers the same things he insists upon in his plea that he ought not to answer to.

T. 1723, cor. M. R.
Norton v. Turvill, 2 *P. Wms.* 145.

3. Where a defendant insists on the benefit of the statute of limitations by way of answer, he shall at the hearing have the like benefit as if he had pleaded it.

T. 1728, cor. M. R. abf. C.
Anon. 2 *P. Wms.* 464.
Vide Roberts v. Hartley, 1 *Bro. Ch. Rep.* 56. *Kenrick v. Clayton*, 2 *Bro. Ch. Ca.* 214.

4. On time given to answer, the defendant may put in a plea; for that is an answer and on oath, but cannot put in a demurrer.

6 May 1729, in Scacc.
Alardes and others v. Campbell,
Bunb. 265.
Vide Reynolds v. Perrott, in
Scacc. 4 May 1727.

5. Bill to set aside an award. Defendant pleaded the award, and that the submission was made a rule of the court of *B. R.*, and that there had been no application to that court pursuant to *stat. 9 & 10 W. 3.*, and that therefore all courts were concluded. Objected that defendants ought not to plead the award. *Per cur.*—The plea should stand for an answer, with liberty to except (*int. al.*) as to the exprefs charges of undue practice in the umpire.

H. 1733, cor. Talbot, C.
Sellen v. Leven, 3 *P. Wms.* 239.
 2 *Eq. Abr.* 75. pl. 31.

6. The defendant pleaded to the whole bill, and on arguing the plea it was ordered to stand for an answer,

answer, without saying one way or other whether the plaintiff might except. The plaintiff not allowed to except, for by an answer was meant a sufficient answer, an insufficient answer being no answer.

Vide Coke v. Wilcocks, Mos. 74. Maitland v. Wilson, 3 Atk. 185. Hawkins v. Crook, 2 P. Wms. 558.

Note; The exceptions in this case were discharged, with liberty for the plaintiff to re-argue the

plea, as appears by Reg. Lib. B. 1733, fo. 130.

7. 3000*l.* was to be raised by a trust-term in a marriage settlement for portions of daughters as should be living, and not advanced by the father at his death. There being several daughters, B., one of them, after she came of age, in the lifetime of her father, and whilst she was unmarried, releases all her share in the 3000*l.* to the owner of the inheritance. B. marries, the father dies; and a bill is now brought by her as in her right to have her share, &c. Defendant pleads the release in bar, and insisted that this share of B., though a possibility only at the time of the release, was assignable in equity, though not at law; and by the same reason might be released in equity, and that possibilities are assignable in equity. Lord Chancellor said, that choses in action and possibilities are assignable in equity, if made upon consideration; but here no consideration appears, and at law a possibility may be released. But this is a demand in equity under a trust, and therefore shall be supported by a consideration; and ordered the plea to stand for an answer.

H. 1734, cor. Talbot, C.

Robinson v. Bavafor,

3 Vin. Abr. 155. pl. 29.

2 Eq. Abr. 90. pl. 18.

Vide Lord Gray v. Ducheſs of

Hamilton, 3 Vin. Abr. 155.

pl. 28. 2 Eq. Abr. 88. pl. 11.

Theobald v. Duffay, 1 P. Wms.

574. (n.) Higden v. Watkin-

ſon, 3 P. Wms. 132. Farne's

Cont. Rem. 439.

8. Award and release pleaded to a bill to open an account. The plea ordered to stand for an answer.

M. 1790, cor. Thurlow, C.

Burton v. Ellington,

3 Bro. Ch. Ca. 196.

See more under *Plea*.

Sec. 9. Where the Answer of a Defendant may be read against himself, and where he may thereby conclude, charge, or discharge himself; And herein of the Admission of a Defendant's Answer as Evidence upon a Trial at Law.

1: A Man by answer says he believes and hopes to prove the money paid. If the cause is heard on bill and answer, it shall conclude the plaintiff, and he must admit the money paid.

H. 1682, cor. M. R.

Barker v. Wyld & al.

1 Vern. 140.

P. 1687, cor. M. R.
Holford v. Burnell, 1 Vern. 448.
 1 Eq. Abr. 36 pl. 1.

M. 1690, Canc.
Awdley v. Awdley, 2 Vern. 104.
Vide Howard and Brown,
 which was the first case where a
 man had charged himself by answer, and his answer allowed as a good discharge, and the court said it
 ought to be the last. 1 Eq. Abr. 163.

T. 1702, cor. M. R.
Bayly v. Hill,
 1 Eq. Abr. 10. pl. 10.

P. 1706, cor. Cowper, C. S.
Ibbotson v. Rhodes, 2 Vern. 555.
 1 Eq. Abr. 229. pl. 13. S. C.
 but not S. P. for the point there seems *contra*.

T. 1729, cor. King, C.
Green v. Rod, Mos. 184.
 2 Eq. Abr. 325. pl. 32. S. C.
 but not S. P. 346. pl. 8. S. C.
 but not S. P.—*Vide* 1 Ch. Ca. 8.

3 Nov. 1750, cor. Hardw. C.
Glyn v. Bank of England,
 2 Ves. 42.

2. Defendant held to the offer in his answer, though the circumstances of the case were varied from what they were at the time of answer put in.

3. If a man charged himself by answer, whether this answer shall be allowed as a good discharge?

4. Defendant's aunt lived with her, and being very infirm, defendant received her monies. The aunt died intestate, and plaintiff being entitled to a distributive share, brought a bill for an account of the monies received for the intestate. Defendant by her answer set out the several sums, to whom paid and how applied. The cause being heard without proof, an account was decreed and referred to a Master. The Master's report charged defendant with the sums confessed to be received, and submitted if she ought to be discharged by the same answer. *Per cur.*—Referred back to the Master for defendant to prove her answer: if disproved, no credit should be given to it in other particulars; if otherwise, the court inclined it should be a discharge as well as a charge.

5. A defendant's answer directed to be read as evidence at a trial at law.

6. If an issue is directed, the court often orders the defendant's answer to be read on the trial, if it is not falsified, or but by one witness only.

3 Ch. Ca. 123. 2 Vern. 555. 283. 1 Vern. 161. 137.

7. The answer of a defendant directed to be read at law in evidence to a jury, which could not be done by the rules of law.

See more under *Account*, *Evidence*.

Sec. 10. Where the Answer of one Defendant may be read against another Defendant.

M. 1715, cor. Cowper, C.
Ans. 1 P. Wms. 300.

1. Regularly the answer of one defendant shall not be made use of as evidence against another; but one defendant saying by his answer that he was much in years, and could not remember

§ 10. Read against a Co-defendant.

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member the matter charged in the bill, but that J. S., another defendant, was his attorney, and transacted the matter of which defendant J. S. gave an account by his answer. The court, on motion for an injunction, ordered the attorney's answer to be read against the other defendant whose answer *had referred* thereto.

2. One reason among others why the answer of one defendant cannot be made use of against another seems to be, because, if that were allowed, a man might make a friend co-defendant, who might put in an answer in his favour, and the other defendant would have no opportunity of cross-examining to it.

3 P. Wms. 311. n.
Vide Wych v. Mead,
3 P. Wms. 110.

3. One defendant shall not be prejudiced or concluded by the admission of another.

7 Mar. 1720, Dom. Proc.
Chevers & al. v. Goughan and
another, 2 Bro. P. C. 225.

4 Vin. 443. c. 6. 448. c. 10. 7 vol. 339. c. 17. 2 Eq. Abr. 67. c. 4.

4. Answer of two arbitrators. Defendants. read against a third defendant, party to the award.

H. 1724, in Scacc.
Mullins v. Simmonds & al.
Bunb. 186. 196.
Vide 1 Vern. 159.

5. Where an injunction is obtained in the absence of one of the defendants abroad, on a motion to discharge that order, the answer of the other defendant cannot be read.

T. 1707, in Scacc.
St. John v. Cargill and another,
3 Anst. 933.

Sec. 11. Of the Answer of a Feme Covert, Infant, Lunatic, or superannuated Person.

1. **T**HE answer of a superannuated person, put in by guardian, shall be read against him as an answer of one of full age. *Secus* of an infant, who is to have a day to shew cause *.

P. 1704, Canc.
Sir Richard Lewing v. Lady Ca-
werley & al. Prec. in Ch. 229.
* Vide Gilb. Rep. in Eq. 4. as to
an infant.

2. Where the *husband* will answer to the *pre-
judice* of the *wife*, who is an *executrix*, a court of
equity, upon motion, will give leave for her to
answer separately.

P. 1709, cor. Cowper, C.
Anon. 2 Eq. Abr. 66. pl. 2.
A feme covert in her husband's
absence allowed to answer without
a guardian, on the circumstances

of the case. Bunb. 167. The husband allowed to answer without the wife. Bunb. 175.

3. After a decree *nisi causa* against an infant on his coming of age, he may put in a new answer before decree made absolute.

M. 1718, cor. M. R.
Fountain v. Gaine and another,
1 P. Wms. 504.
Vide Napier v. Lady Effing-
ham, 2 P. Wms. 401. Bennet v. Lee, 2 Atk. 531. Exceptions cannot be taken to an infant's
answer. Strudwick v. Pargiter, Bunb. 338.

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4. The

P. 1724, in Scacc.
Glover & al. v. Young,
 Bumb. 167.

4. The answer of a feme covert without her husband or guardian permitted to be filed in a case of necessity.

H. 1726, cor. King, C.
Sir John Napier v. Lady Effingham, 2 P. Wms. 401.
Affirmed in Parliament, 3 Bro.
 P. C. 301.

5. Upon a decree against an infant, unless cause, within six months after he comes of age, the infant may answer anew.

Vide Fountain v. Caine, 1 P. Wms. 504. *Bennet v. Lee*, 2 Atk. 531.

Note; The consequence of an infant's putting in a new answer is, that he may examine witnesses anew to prove his defence, which may be different from what it was before.

T. 1726, cor. King, C.
D. of Chandos v. Talbot & Ux.
 2 P. Wms. 371.
 2 Eq. Abr. 145. pl. 5.
 Sel. Ca. in Ch. 24. S. C. only
 says, that a separate answer put
 in by a feme covert without or-
 der, is irregular.

6. Regularly the answer of a feme covert, if separate, ought to have an order to warrant it; but if the feme covert's separate answer be put in without an order, and the same be a fair, honest answer, and deliberately put in with the consent of the husband, and the plaintiff accepts of it and replies, the court will not, on the motion of the wife, or of her executors, set it aside.

H. 1727, cor. King, C.
Evans v. Cogon,
 2 P. Wms. 451.

7. A feme covert cannot bind herself by her answer, much less her husband as to her inheritance.

P. 1727, cor. King, C.
Leg v. Turnbull,
 2 P. Wms. 409.
 2 Eq. Abr. 691. pl. 4.

8. A copyholder in fee by will charges his lands with his debts. The lands being in *England*, and the heir an infant in *Scotland*, the creditors bring a bill to have their debts paid out of the copyhold premises; whereupon the heir appears, and there is an attachment for want of an answer. The heir being an infant, the next step is to bring up the body, but he being in *Scotland*, and out of the reach of the process of the court, the plaintiff cannot bring up the body. The infant shall answer by a certain time, or shew cause why process should not issue against him as if of full age, or why a receiver should not be appointed.

H. 1731, cor. King, C.
Abergavenny v. Abergavenny,
 W. Kel. 5.

4 Vin. Abr. 147. pl. 20.
 2 Eq. Abr. 145. pl. 6.
Vide 2 P. Wms. 311. S. C. but
 not S. P.

9. On a motion to suppress the answer of the defendant, for that she, marrying after the bill filed, and before answer put in, had put in her answer without her husband. But *per King, C.*—Marrying *pendente lite* does not abate the suit, and though there is no charge in the bill against the husband or subpoena served on him, yet he must join in the answer of the feme for conformity; for no married woman can put in an answer without her husband by the rules of the court, without special leave, and an order for that purpose.

H. 1733, cor. Talbot, C.
Wrottesley v. Bardish,
 3 P. Wms. 237.

10. An infant's answer cannot be given in evidence against him, because it is not the answer

§ 11. *By Persons incapacitated.*

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swer of the infant, but of the guardian who is sworn.

2 *Eq. Abr.* 517. pl. 16.
Vide *Carth.* 79. *Taylor v. Atwood*, 2 *P. Wms.* 643.

11. But where a defendant put in an answer to a bill brought by an infant who did not reply to it, in such case the answer was taken to be true, in regard the defendant, for want of a replication, was deprived of an opportunity of examining witnesses to prove his answer, and he ought not to suffer for such omission in the plaintiff.

3 *P. Wms.* 237. n.
Thurston and another v. Nutton & Ux.
Vide *Legard v. Sheffield*, 2 *Atk.* 377. *contra.*

12. Baron and feme defendants to a bill, the feme must answer, though the answer cannot be read against the husband, but may (possibly) be read against her if she survives; but in no case is the feme bound to answer a bill subjecting her to a forfeiture, though the husband has submitted to answer.

H. 1733, cor. *Talbot, C.*
Wrottesley v. Bendish,
3 *P. Wms.* 238.
Vide *Salk.* 550. 1 *Vern.* 60.
109, 110. *Chauncey v. Ta-*
hourden, 2 *Atk.* 392. *Chancey*
v. Fenhoulet, 2 *Ves.* 265. *Pey-*
ton v. Bury, 2 *P. Wms.* 626.
But generally a defendant must
answer fully, or object to the

discovery by plea or demurrer. *Cookson v. Ellison*, 2 *Bro. Ch. Rep.* 238. and 1 *Ves. jun.* 292. *Shepherd v. Roberts*, 3 *Bro. Ch. Rep.* 483. *Selby v. Selby*, 4 *Bro. Ch. Rep.* 11.

3 *Bro. Ch. Rep.* 239. *Hall v.*

13. One through great age being deprived of his memory, and become almost *non compos mentis*, was admitted to answer by his guardian, in regard the matter in question was but small; but had the value been considerable, the regular way would have been to have taken out a commission of lunacy, and have got a committee assigned.

3 *P. Wms.* 111. n.
M. 1733, cor. *Talbot, C.*
Anon.

14. An infant may amend his answer when he comes of age, and therefore exceptions cannot be taken to it.

T. 1734, in *Scacc.*
Strudwick v. Pargiter,
Burb. 338.
2 *Eq. Abr.* 60. pl. 9.

15. A wife who cannot in conscience consent to an answer which is drawn up by her husband, may have an order to answer independently.

24 *July* 1740, cor. *Hardw. C.*
Ex parte Halfam, 2 *Atk.* 50.

S. C. Where a husband by menaces prevails on a wife to put in an answer contrary to what she believes to be true, he may be punished for contempt.

16. Lord *Hardwicke* doubted whether an infant can put in a new answer before he comes of age, so as to rehear the cause over again; for if there should be a decree against him on the second hearing, he may with as much reason put in a third answer, which would occasion infinite vexation.

20 *Dec.* 1742, cor. *Hardw. C.*
Bennet v. Lee, 2 *Atk.* 487.
Vide S. C. on a petition for a bill
of review, 2 *Atk.* 529.

17. A husband's bringing a bill against a wife, is admitting her to be a feme sole, and she must put in her answer as such.

8 *April* 1747, cor. *Hardw. C.*
Ex parte Strangeways,
3 *Atk.* 478.

H 4

13. A

8 Feb. 1750, cor. Hardw. C.
and Strange, M. R.
Travers v. Butkley, 1 *Vif.* 383.

M. 1792, in Scacc.
Hardcastle v. Shafio, 1 *Anst.* 77.

M. 1793, in Scacc.
Brassington v. Brassington,
2 *Anst.* 369.

18. A wife appears, and prays time to answer separate from her husband, who lives abroad, and she has an order for that purpose; the court will not afterwards set it aside.

19. In a suit for discovery, the answer of the party interested cannot be dispensed with, though an infant, and although the person from whom his father purchased has answered, and denied any knowledge of the circumstances.

20. A motion for leave to answer by guardian must name the guardian.

See more under *Baron and Feme, Infant, Lunatic*.

A—e

Appeal.

For whom it lies, when and in what Cases, and what Evidence is admissible.

H. 1683, cor. North, C. S.
Johnson v. Desminere,
1 *Vern.* 223.
1 *Eq. Abr.* 83. pl. 3.

T. 1683, cor. North, C. S.
Portington v. Tarbock,
1 *Vern.* 177.
Jenitt & Ux. v. Bishopp & al.
1 *Vern.* 184.

H. 1684, cor. North, C. S.
Hall v. Douthwaite, 1 *Vern.* 298.
Cur. advis. vult of the proceedings in the Co. Pal. which were stated to have been unjust.

H. 1686, cor. Jeffries, C.
Addison v. Hindmarsh,
1 *Vern.* 443. (n.)

1. AN appeal lies from the court of *Policies* in London to the court of Chancery.

2. An appeal will not lie in Chancery from a decree in a county palatine. But a *certiorari* bill may be brought to remove a cause into the Chancery out of a court of equity in a county palatine.

3. A suggestion in a bill, that there are incumbrances made to persons living out of a county palatine will entitle the court of Chancery to a jurisdiction, touching lands lying within the county palatine.

4. Upon a bill of appeal from an inferior court the appellant need not assign particular errors, as he must upon a bill of review.

S. C. But he cannot examine *de novo* upon either of those bills, though, in the special court, they examine over and over again upon new allegations.

S. C. Appeals lie from the court of equity at Lancaster to the Dutchy court.

5. After

5. After a decree of dismissal affirmed on an appeal to the Lords, a bill is brought for a discovery of a deed (said to be burnt pending the suit) which made out the plaintiff's title, and the bill is brought to the end, that, after such discovery, the plaintiff might apply to the House of Lords for relief. On demurrer the defendant ordered to answer, but plaintiff to proceed no farther without leave of the court.

M. 1686, cor. Jeffries, C.
Barbon v. Searle, 1 Vern. 416.

6. No appeal lies to the House of Lords from a sentence in the delegates, nor from a decree on the statute of charitable uses.

M. 1689, cor. Lds. Comm.
Saul v. Wilson, 2 Vern. 113.

7. If the parliament be prorogued pending an appeal, the party may proceed in Chancery on the account decreed there notwithstanding the appeal.

18 Jan. 1697, Dom. Proc.
Bampfild's Trustees v. Popham,
Colles' P. C. 2.
Vide 1 Vern. 344.

S. C. An appeal cannot be maintained where the matters complained of have been once settled by the Lords.

8. After an appeal a petition was entertained to explain the decretal order as to costs.

22 Mar. 1700, Dom. Proc.
Bre land and another, Executors,
v. *Cope & al*, Colles' P. C. 97.

9. A person, not a party in the original cause, will not be suffered to interplead by a petition of appeal.

20 April 1701, Dom. Proc.
Handcock and another v. Shoen,
Bart. Administrator,
Colles' P. C. 122.

S. C. There not being proper parties to the original decree is a good ground of appeal.

10. A party under terms to pay a sum of money in the original cause declining to do so, and bringing an appeal in order to avoid it, his appeal dismissed with costs.

19 Dec. 1702, Dom. Proc.
Hyndmarsh & Ux. v. Everard,
Colles' P. C. 240.

Note to S. C. A counsel or agent, preparing or signing an appeal with words reflecting on the respondent, called to the bar and reprimanded.

11. Appellant's idleness, and his solicitor's ignorance, no ground for an appeal. Proofs cannot be used before the Lords which the party neglected to produce in the court below.

18 Dec. 1702, Dom. Proc.
Prise v. Button, Colles' P. C. 246.
Proc. in Ch. 212.

12. A person apprehending himself injured by a general order of a court not made in any cause, (as for the filing an ancient record which had been many years mislaid,) may bring an appeal to the Lords; and the person, at whose instance the order was made, cannot decline the Lords' jurisdiction, by alleging that it is an original, and not an appellate jurisdiction, or that multitudes not before the house are interested in the record.

12 Feb. 1702, Dom. Proc.
Lord Wharton v. Squire,
Colles' P. C. 276.

13. Where

16 Feb. 1702, Dom. Proc.
Northcott v. Northcott,
Colles' P. C. 287. 4 *Vin.* 477.
 7 *Vin.* 398. 8 *Vin.* 299.
Proc. in Ch. 115. cited in *Sparling v. Lynn*. 2 *Vern.* 137. cited in *Roberts v. Bennett*.

H. 1704, cor. Wright, C. S.
Stephenson v. Houlditch & al.
 2 *Vern.* 491.
 1 *Eq. Abr.* 81. pl. 2.

M. 1704, cor. Lds. Comrs.
Needham v. Smith, 2 *Vern.* 464.

21 Jan. 1706, Dom. Proc.
Lewis v. Fielding,
Colles' P. C. 364.

20 Feb. 1706, Dom. Proc.
Deye, Executor, v. Stevenson
 & *Ux. Colles' P. C.* 357.

H. 1709, cor. Deleg.
Dr. Pelling v. Whiston,
 1 *Com. Rep.* 199.
 2 *Gibb. Cod.* 1007.
 1 *Burn. Ecc. Law*, 394.

1 Mar. 1710, Dom. Proc.
Greenfields v. Provost, &c. of
Edinburgh, Colles' P. C. 427.

T. 1710, Canc.
Thompson v. Waller,
Proc. in Ch. 295.
 2 *Eq. Abr.* 81. c. 2.
 T. 1718, Canc.
Wright v. Pilling,
Proc. in Ch. 496.

2 *Eq. Abr.* 81. t. 4. S. P.
Vide 1 *Vern.* 443. 2 *Vern.* 464.
Gibb. Eq. Rep. 151. 1 *P. Wms.* 300. 2 *Atk.* 408. The rule is, that on an appeal the whole case is open, but on a rehearing only so much as is petitioned against. *Hayward v. Colley*, *Sel. Ca. in Ch.* 24. at *vide* *Popping's case*, *Sel. Ca. in Ch.* 48. and *Rawlins v. Powell*, 1 *P. Wms.* 300.

19 June 1713, Dom. Proc.
Sbere v. Cook, Colles' P. C. 437.

6 July 1713, Dom. Proc.
Delpard and others v. Ormsby
 & *al. Colles' P. C.* 459.

13. Where the decree, or order appealed from, is expressed to be made upon appellant's own consent, the appeal will be dismissed.

14. If upon a *certiorari* bill the cause is brought on to a hearing, the court, if they think fit, may make a decree, or send it back to the mayor's court to be determined there; and sometimes the court sends it back after publication passed, and a *subpœna* to hear judgment, and before the cause comes to a hearing.

15. Upon an appeal from the Rolls to the Lord Chancellor or Lord Keeper the cause is entirely open.

16. If the defendant's plea to a bill in equity (e. g. purchaser without notice) be falsified by verdict, his appeal will be dismissed.

17. The neglect of a party's own fix-clerk no ground for an appeal.

18. In a libel of heresy, the refusal of a citation by the dean of arches was held a good cause of appeal to the delegates.

19. An appeal to the Lords lies from the Lords of Session in Scotland in a matter of ecclesiastical cognizance, though there was an appeal from the presbytery to a provincial synod.

20. Upon an appeal from the Rolls to the Chancellor, or from him to the House of Lords, no new matter to be insisted on.

Upon appeal from the Rolls to the Lord Chancellor the cause is open, and the party is at liberty to read new proof, and offer what he can against the decree.

21. An appeal, brought on grounds known to the appellant himself to be frivolous and false, dismissed with exemplary costs, viz. 40*l.*

22. After a party has once agreed to certain issues to be tried, he shall not make the impropriety of those issues a ground of appeal.

23. On

23. On plaintiff's petition to rehear, the cause is open as to the whole with respect to defendant; but as to plaintiff, it is open only as to what is complained of in the petition.

M. 1715, cor. Cowper, C.
Ratcliff v. Powell,
1 P. Wms. 300.

24. No words in a grant from the crown can deprive a subject of his right to appeal, much less if the grant be silent in that particular.

M. 1716, Council at the Cock-
pit,
Christian v. Corren,
1 P. Wms. 329.
2 Eq. Abr. 81. pl. 3.

S. C. An appeal lies from a decree in the *Isle of Man* to the king in council.

25. Such defects in a decree, as the court will rectify upon motion, are not sufficient grounds for an appeal.

29 Nov. 1721, Dom. Proc.
Bunbury & Un. v. Bolton & Un.
2 Bro. P. C. 361.
7 Vin. 399. c. 19.

26. An agent being prosecuted for a contempt in disobeying an order, of which he had no notice, may join in an appeal from that order, though no party to the cause in which the order was made.

1 Feb. 1722, Dom. Proc.
Stone v. Byrne, 2 Bro. P. C. 399.
5 Vin. 452. c. 14.
15 Vin. 55. c. 37.

27. An appeal from decrees made in the plantations lies only to the king in council.

M. 1724, cor. Macclesfield, C.
Sir John Fryer v. Bernard,
2 P. Wms. 262. Sel. Ca. in Ch. 5.
9 Mod. 124. nomine Fryer and Vernon, 2 Eq. Abr. 82. pl. 5.
Vide Lord Arglaish v. Muschamp, 1 Vern. 235.

28. No appeal lies from an order or decree of the Lord Chancellor touching idiots or lunatics, but only to the king in council.

Ex parte Pitt, 3 P. Wms. 108. n.
See the resolutions of the Lords
on this point.
Vide Rochfort v. Earl of Ely,
6 Bro. P. C. 329.

29. All depositions taken in a cause, but not read at the *hearing*, may be read at the *rehearing*; and this is the constant practice of the court. But in *appeals* to the Lords, nothing is read but what was read below.

T. 1725, Canc.
Christmas v. Christmas,
Sel. Ca. in Ch. 21.
2 Eq. Abr. 492. pl. 9.

30. On *appeal* the whole cause is open; *aliter* on rehearing, only so much of the case as is petitioned against.

T. 1725, Canc.
Hayward v. Colley,
Sel. Ca. in Ch. 24.
2 Eq. Abr. 491. c. 6.

31. On *appeal* new matter may be produced; *aliter* on commission of review, unless there be a clause to receive new matter.

T. 1725, cor. King, C.
Popping's case, Sel. Ca. in Ch. 48.
2 Eq. Abr. 82. (n. to pl. 4.)

32. An appeal from the spiritual court must be brought within fifteen days.

M. 1728, cor. King, C.
Hill v. White, Masf. 30.
Vide 4 Inst. 339. Supp. to
Wentw. 337.
Vide Fortescue 10.
Vide post, pl. 42.

An appeal to the House of Lords must be brought within five years from the enrolment of the decree below, by a standing order of the house, made 24 March 1725. And

An appeal to the emperor must be within two years.

M. 1730, cor. King, C.
Gould v. Granger, *Maj.* 395.

33. Lord Chancellor allowed an appeal from Master of the Rolls for costs only, and said he had known the Lords allow an appeal for costs only, though the old practice was otherwise.

2 April 1735, Dom. Proc.
Barlow v. Bateman & al.
 4 Bro. P. C. 194. 5 Vin. 88. c. 8.
 3 P. Wms. 65. S. C. but not S. P.

34. No appeal to the House of Lords will lie against a decree before it is signed by the Lord Chancellor.

12 Mar. 1739, Dom. Proc.
Nagle v. Foot & al.
 4 Bro. P. C. 368.

35. Nor from an order of a court of equity to shew cause before such order be made absolute.

25 April 1740, Dom. Proc.
Vernon, Widow, v. Vernon,
 4 Bro. P. C. 383.

36. Under what circumstances an appeal may be brought from an old decree, by a person who was neither party or privy to the suit in which the decree was made?

S. C. No appeal lies to the House of Lords in Ireland from the judgment or decree of any court in that kingdom.

S. C. The statute of 6 Geo. 1. c. 5. did not introduce any new law, but is only declarative of what the law was before.

Oct. 1742, cor. Hardw. C.
Hedges v. Cardonnell, 2 Atk. 408.

37. On an appeal from the Rolls, the appellant may be let into new evidence, which was not read there, provided he will give up his deposit.

24 April 1746, Dom. Proc.
Lake, Widow and Administratrix,
v. Mason, Widow and Administratrix, 4 Bro. P. C. 553.

38. On an appeal, the house reserve giving judgment upon the point till an account is taken between the parties. The account is accordingly taken; but before the appeal is brought on again one of the parties dies, and the suit below is thereupon regularly revived. This is sufficient, and the appeal itself need not be revived.

10 June 1749, cor. Hardw. C.
Owen v. Griffith, *Amb.* 521.
Vide *Turner v. Turner*, *Amb.*
 776. *Carwardine v. Carwardine*,
 19 Nov. 1757. *Pitt v. Gage*, in Dom. Proc. 1 Bro. P. C. 550.

39. Tenant by *elegit* received profits beyond his debt. Decreed to account and pay costs. He appealed for costs only, and was relieved.

10 May 1754, cor. Hardw. C.
Bradish v. Gee, *Amb.* 229.
Vide *Richmond v. Tallieur*,
Floyd v. Mansel, *Sir George Downing v. Gage*, 1 Eq. Abr. 165.

40. Decree made by consent of counsel cannot be appealed from.

29 Feb. 1768, Dom. Proc.
Richfort & Ux. and another v.
Earl of Ely & al.
 6 Bro. P. C. 329.

41. No appeal to the House of Lords lies against an order, awarding a commission of idiocy or lunacy, by the Lord Chancellor, Lord Keeper, or Lords Commissioners of the Great Seal.

Note: It does not appear that any argument was made at the bar of the house, or that any cases were printed on this occasion.

S. C. Nor against any proceedings, touching the awarding or refusing of such commission.

42. By a standing order of the House of Lords, of the 24th of *March* 1725, the time for receiving appeals is limited to five years from the signing and inrolling of the decree; and therefore, upon an appeal brought from two decrees, of the 15th of *July* 1728 and the 5th of *February* 1731, which were inrolled in *March* 1764, the house declared, that the appeal ought not to have been received, and accordingly it was dismissed.

S. C. In making this order, the house is said to have considered the inrolment of any decree pronounced by the court of Chancery as being by *legal relation*, the act of the same day on which the decree was pronounced.

43. Where a party to a suit sells and conveys all his right and interest under the decree to another for a valuable consideration, such sale and conveyance is an absolute bar to an appeal from that decree.

44. Where an order, directing an issue to be tried in a particular county, is affirmed upon an appeal, the court below have afterwards no authority to direct the issue to be tried in any other country.

45. On the hearing of all appeals this principle universally prevails, that no evidence can be received which was not laid before the court below; nor can any evidence which was received below be objected to above, unless the admission of improper evidence be among the points of the appeal.

46. It is a known and established rule, that an appeal does not lie against an order made by the consent of parties.

47. There shall not be an appeal or rehearing for costs only, *unless under very particular circumstances*.

48. Whereas, by the practice of the court, 5*l.* only is deposited with the register by the party who appeals from a decree or obtains a rehearing, and only 40*s.* on rehearing an exception to a Master's report to answer the costs when the decree or former order is not altered; which is not a sufficient recompence, several rehearings being sought merely for delay. It was therefore ordered,

24 Jan. 1770, Dom. Proc.
Smythe & al. v. Clay & al.
6 Bro. P. C. 395.

25 Jan. 1773, Dom. Proc.
Cusack & Ux. Executrix, v. Gilbert, Administrator,
6 Bro. P. C. 573.

2 May 1774, Dom. Proc.
Lord Milton v. Edgeworth & al.
Vide 6 Bro. P. C. 588.

22 Dec. 1774, Dom. Proc.
Eden, Bart. v. E. of Bute & al.
7 Bro. P. C. 206.

27 Feb. 1775, Dom. Proc.
Toder & Ux. v. Sansam & al.
6 Bro. P. C. 244.

P. 1782, cor. C.
Wirdman v. Kent,
1 Bro. Ch. Ca. 140.
Vide *Owen v. Griffith*, 1 Ves.
250. *Cooper v. Scott*, 19 Nov. 1757.

Ordo Curiae.
7 Feb. 1794, per Loughb. C.
4 Bro. Ch. Ca. 543.

on 30th *April* 1701, that when any party appeals from a decree, or obtains a rehearing of any cause or exception, such party shall in future deposit 10*l.* upon rehearing a cause, and 5*l.* on rehearing an exception when the decree or former order is not materially varied; besides which such party shall be liable to such further taxed costs as the court shall direct. For the due observance whereof, it is now *ordered*, that copies of the above abstracted order be hung up in all the Chancery offices.

See more under *Costs, Decree, Rehearing.*

A—c

Appearance.

T. 1726, cor. King, C.
Jervoise v. O'Carrol,
2 P. Wms. 368.

22 Feb. 1742, cor. Hardw. C.
Darwent v. Walton, 2 Atk. 510.

8 Feb. 1750, cor. Hardw. C.
and Strange, M. R.
Travers v. Buckley, 1 Ves. 386.
Vide *Welldean v. —*, Tot.
157. Dy. 210. Lee v. Lord
Baltimore, Str. 475. Carpenter
v. Fausten, Salk. 114. is a very strong authority.

24 Feb. 1750, cor. Hardw. C.
Vaneffen v. South-Sea Company,
1 Ves. 395.
Vide *Parker v. Blackburn*,
Prec. in Ch. 99.

P. 1784, cor. Thurlow, C.
Mawer v. Mawer,
1 Bro. Ch. Ca. 388.
1 Eg. Abr. 83.

M. 1786, cor. Thurlow, C.
Henderson & al. v. Meggs & al.
2 Bro. Ch. Ca. 127.
Vide 3 Atk. 90.

1. AN order for appearing *gratis* implies that the defendant shall pray no day over.

2. When a defendant is out of the jurisdiction, and cannot be made to appear, it amounts to the same thing as if process had been taken out for want of appearance, and carried on to a sequestration.

3. An appearance salves error in mesne process only, *not in the original writ.*

Appearance by wife without husband may be good.

4. One defendant not appearing, the whole line of process against him is equal to the proceeding of outlawry at common law, and there may be a decree against the other defendants who appeared.

5. Defendant had been served with a subpoena, but had not appeared. Plaintiff proceeded to attachment and sequestration. Defendant *non est inventus*, and had no real or personal estate. Ordered on motion, that defendant appear on a day certain, and the order published as directed by 5 Geo. 2. c. 25. to the end the bill might be taken *pro confesso*.

6. Where a defendant has appeared to and answered the original bill. If he cannot be found to be served with a subpoena to answer the bill of

revivor,

Appearance.

A—e 111

revivor, plaintiff must proceed under the act of 5 Geo. 2. to have the bill taken *pro confesso*.

6. A defendant to a bill, though not served with process, may appear *gratis*, and refer it for impertinence.

M. 1787, cor. Thurlow, C.
Full v. Christ Coll. in Cambridge,
2 Bro. Ch. Ca. 279.

See more under *Contempt, Process*.

Average and Contribution.

A—e

Sec. 1. In what Cases there shall be an Average and Contribution.

1. A Man indebted by several mortgages, judgments, bonds, and simple contract, settles his estates for payment of his debts. The real securities shall be first paid, and then the bonds and simple contract debts in average.

M. 1682, cor. Finch, C.
Cbild v. Stephens,
1 Vern. 101.
1 Eq. Abr. 141. pl. 4.
Vide 4 Co. 59. 2 And. 157.
Cro. Eliz. 734. 822.

2. Settlement to pay 100*l.* per ann. to the heir, and afterwards to raise 100*l.* a-piece for younger children, to be paid according to their seniority; in case of a deficiency they shall all be paid in average.

M. 1685, cor. Jeffries, C.
Bratbwaite v. Bratbwaite,
1 Vern. 335.
1 Eq. Abr. 114. pl. 3. 336. pl. 5.

3. Where the issue and jointress claim by the same settlement, if there be a prior incumbrance, the jointress shall contribute and bear her proportion, and not lay the whole burden on the heir.

H. 1686, cor. Jeffries, C.
Carpenter v. Carpenter,
1 Vern. 440.
1 Eq. Abr. 114. pl. 6.

4. A lessee for years makes several under-leases: the estate is out of repair, and the original lease avoided for non-payment of rent; and some of the under-lessees bring a bill to be relieved against the forfeiture: Equity will not apportion the rent, nor relieve the plaintiffs, but on payment of the whole rent in arrear, and repairing the premises: but having so done, they may compel the rest of the under-tenants to contribute.

T. 1687, cor. Lds. Comrs.
Webber v. Smith,
2 Vern. 103.
1 Eq. Abr. 115. pl. 14. 365. pl. 2.

5. One conveys to the use of himself for life, with power to mortgage what part he pleased; remainder to trustees to sell to pay all his debts, and dies indebted by judgments, bonds, and simple contract. This deed is fraudulent as to the judgment creditors, and they shall not be compelled to

T. 1705, cor. Cowper, C.
Tarback & al. v. Marbury & al.
2 Vern. 510.
1 Eq. Abr. 148. pl. 3.

to take a satisfaction in average with the other creditors, having no notice of the settlement.

1706, Cant.
Warner v. Hayet,
 4 Vin. Abr. 468. pl. 9.
 2 Eq. Abr. 493. pl. 3.
 8 Vin. Abr. 442. pl. 5.
 2 Eq. Abr. 552. pl. 4. W. Kel. 3.

6. An estate being considerably mortgaged was devised to A., and several specific legacies were left to others. The surplus is not sufficient to discharge the debt. All the specific legatees shall contribute towards the discharging the mortgage before the mortgaged premises shall be affected; for the covenant to pay the money makes it a personal debt, and the real estate shall never be put in average with the personal.

H. 1710, cor. Harcourt, C.
Stephenson v. Hayward,
 Prec. in Ch. 310.
 Vide Prec. in Ch. 190. 2 Vern.
 435. 1 Eq. Abr. 142. pl. 6.
 10 Mod. 426. 16 Vin. tit. Payment, 182. pl. 6. 9.

7. A creditor who obtains judgment after the debtor has made a conveyance of his estate for payment of his debts, shall be paid only in average.

M. 1718, cor. Parker, C.
 On appeal from the Rolls.
Carter v. Barnardiston, 1 P. Wms.
 305. 2 Eq. Abr. 224. pl. 5 & 6.
 Vide *Babington v. Greenwood*,
 3 P. Wms. 531. Howell and
 Price, 1 P. Wms. 295. and notes
 there on the point of contribu-
 tion.

8. One seised in fee of the manors of A. and B. mortgages A. for 4000*l.*, and by will charges all his real estates with the payment of his debts, and devises A. to C. and B. to D., and dies. The devisee of A. shall compel the devisee of B. to contribute to pay the mortgage on A.; but if the will proves void, then no contribution.

M. 1726, cor. King, C.
Gibson v. Scudamore, Mosf. 7.
 Sel. Ca. in Ch. 63. & 2 Eq.
 Abr. 773. pl. 18. S. C. but not S. P.

9. Specific legatees, on a deficiency of assets, shall not abate in proportion with pecuniary legatees.

H. 1730, cor. Jekyll, M. R.
Harris v. Ingledew, 3 P. W. 96.
 et vide note. 2 Eq. Abr. 233.
 pl. 17. 462. pl. 15.

* This is not now received as the law of the courts of equity, which supply the want of a surrender of a copyhold estate in favour of creditors, so far only as may appear necessary for the payment of the debts. Vide *Drake v. Robinson*, 1 P. Wms. 443. *Haslewood v. Pope*, 3 P. Wms. 322. *Malabar v. Malabar*, Ca. temp. Talb. 78. *Combs v. Gibson*, 1 Bro. Ch. Rep. 273. *Hillier v. Tarrant*, Ca. temp. Talb. 3d edit. 288. n. & vid. 3 P. Wms. 98. notes.—But this is to be understood of the legal estate only, for an equitable estate of copyhold will pass by such devise without a surrender. Vide *Cai v. Ellison*, 3 Atk. 73. *Tufnel v. Page*, *Barnard*. 9. *Allen v. Poulton*, 1 Ves. 121. *Macnamara v. Jones*, 1 Bro. Ch. Rep. 481.

10. One by will charges all his worldly estate with his debts, and dies seised of freehold and copyhold estates, which he particularly disposes of by his will. The copyhold, though not surrendered to the use of his will, shall yet be applied to the payment of the debts, *pari passu* with the freehold.

Vide *Noys v. Mordaunt*,
 2 Vern. 581. *Streatfield v.*
Streatfield, Ca. temp. Talb. 176.
 &c.

In *Hillier v. Tarrant*, this was treated as a case in which the heir at law was bound to make good the surrender of the copyhold, by his election to take under the will according to the principle in *Noys and Mordaunt*; but it does not appear by the pleadings, or by the words of the decree, that the case was put upon that ground.

S. C. If I charge all my lands with payment of my debts, and devise part to A. and other part to B. &c. the creditors cannot be paid out of the lands till the Master has certified the proportion which each devisee is to contribute: but if the Master certifies that the debts will exhaust the whole real estate, then the creditors may proceed against any one devisee for the whole.

11. One dies indebted by bond, and seised in fee of divers lands, part of which he devises to *J. S.*, and the other part he devises to his heir at law: though this latter devise is void, (as to the purpose of making the heir take otherwise than by descent,) yet it shews the testator's intent that the heir should have his land; and therefore (as it seems) the land devised to *J. S.* and the other lands devised to the heir at law shall contribute in proportion to pay the bond debts.

3 P. Wms. 367. N.
Vide Howell v. Price, 1 P. Wms. 294. N. Long v. Short, 1 P. Wms. 403. Clifton v. Birt, 1 P. Wms. 678. O'Neal v. Mead, 1 P. Wms. 693.

12. If one who confesses a judgment aliens part of his land, and the rest descends, the heir shall *not* have contribution against the purchaser.

1731, cor. King, C.
Herey v. Woodhouse & al. Sel. Ca. in Ch. 3. 4. 2 Eq. Abr. 224. pl. 8. W. Kel. 3.

13. An annuitant for life out of leasehold is not bound to contribute towards the expence of renewal.

6 Nov. 1752, Canc.
Maxwell v. Alpe, 1 Bro. Ch. Ca. 444. (n.) 1 Eq. Abr. 116.
Vide Stone v. Theed, 2 Bro. Ch. Ca. 243.

14. A creditor having five bonds, one of which had been paid before bill filed, afterwards a decree that the specialty creditors should abate in proportion. He shall not be called upon to bring back what he had received, but only shall abate on the outstanding debt.

H. 1703, cor. Lés. Comrs.
Lothian v. Hasel, 4 Bro. Ch. Ca. 167.

See more under *Debtor and Creditor, Devise and Devisee, Legacy.*

Sec. 2. In what Proportions an Average and Contribution shall be made.

1. A Mortgage is devised to *A.* for life; remainder to *B.* in fee. If the mortgage is redeemed, the money shall be paid to them in proportion to the value of their estates, viz. one-third to the tenant for life, and two-thirds to the remainder-man.

M. 1682, cor. Finch, C.
Brent v. Best and others, 1 Vern. 70.
 1 Eq. Abr. 117. pl. 1.

2. Lands subject to a mortgage are devised to *A.* for life, remainder to *B.* in fee. *A.* redeems and dies. *Per cur.*—Had *B.* come in the lifetime of *A.* he should have paid only two-thirds of the money, but now the executor of *A.* who enjoyed but for a year, must make an allowance only for the time that *A.* enjoyed the estate.

T. 1686, cor. Jeffries, C.
Clyat v. Battefon, 1 Vern. 404.
 1 Eq. Abr. 117. pl. 3.
Vide 1 Ch. Ca. 224. 271.
 2 Vent. 343.

3. *J. S.* made a settlement of his estate on himself for life, then to trustees for 99 years, to raise 500*l.* apiece for his three nieces, payable at 21;
 VOL. I. I remainder

H. 1690, Canc.
Rivers v. Rivers, *Proc. in Ch.* 214
 2 Eq. Abr. 223. pl. 2.
Vide Nightingale and Lawson,

1 Bro. Ch. Ca. 440. as to the proportion tenant for life shall bear with the remainder-man in fines and renewals, where it is said that in a beneficial lease tenant for life renewing, the fine shall be apportioned according to the number of years unexpired, and the respective interests of the parties; and in Stone and Theed, 2 Bro. Ch. Ca. 243. the fines were decreed to be paid out of the accumulated fund, and not apportioned between the tenant for life and remainder-man.

P. 1692, Canc.
James v. Hailes,
Prec. in Ch. 44.

H. 1697, Canc.
Eure v. Eure,
1 Eq. Abr. 115. pl. 15.

H. 1715, cor. Cowper, C.
Pagett v. Hopkins, Prec. in Ch.
411. *Gilb. Ch. 335. Gilb. Eq. Rep. 111.*

V. Prec. in Ch. 255. 1 Eq. Abr. 60. pl. 2, 3, 4, 7. 1 Vern. 309. 2 Vern. 61. 118. Ca. temp. Talb. 173. 3 P. Wms. 409. 1 Atk. 464. S. C. cited.

In Mead and Lord Orrery, 3 Atk. 240. Mr. Vernon expressed himself dissatisfied with the decree in this cause; but Lord Hardwicke said he could see no ground for it.

H. 1717, cor. Cowper, C.
Long v. Short, 1 P. Wms. 404.
2 Vern. 756. 1 Eq. Abr. 114.
pl. 7. 2 Eq. Abr. 223. pl. 4.

Note. The will was made since 3 & 4 W. & M. against fraudulent devises.

Every devise of land is specific. Vide *Forrester v. Lord Leigh*, Amb. 171—See more of Contribution and Marshalling Assets in *Clifton v. Burt*, 1 P. Wms. 678. *Hallwood v. Pope*, 3 P. Wms. 322.

T. 1730, cor. King, C.
Chambers v. Chambers,
Fitzgib. 127. 5 Vin. Abr. 567.

remainder to plaintiff for life; remainder to his first son in tail; remainder over. Bill by plaintiff to be let into possession, paying his proportion of the 1500*l.* charged, 500*l.* of which was due presently, and the rest *in futuro*. Decreed plaintiff's estate for life to bear 700*l.*, and those in remainder 800*l.*; but if the other 800*l.* should under the limitations become payable in plaintiff's life, he was to pay it, and the 99 years term should be his security for reimbursement.

4. An estate in mortgage settled on *A.* for life, remainder to *B.* in fee. Tenant for life shall bear two-fifths of the principal and interest, and the remainder-man three-fifths.

5. *A.* devised a rent-charge of 10*l.* per ann. to *B.*, and another rent-charge of 10*l.* per ann. to *C.*, both issuing out of the same land, and with the like clause of entry, but the land was inadequate to answer both; both were in arrear, and each brought his ejectment and recovered. Defendant being in possession, the other grantee brought his bill to have an account of the profits, and that one moiety might be applied to satisfy his arrears, which was decreed accordingly.

6. A freeman of London, having issue two daughters, devises 600*l.* apiece to them, and makes his wife executrix. By an estimate it appeared that his personal estate at his death was 18,000*l.*, to 6000*l.* of which the widow being entitled, *A.* her second husband, in consideration thereof, settled a jointure of 600*l.* per ann. Afterwards a loss of 12,000*l.* befel the freeman's estate: and though the wife was dead, and it was urged that the second husband was a purchaser of her fortune, yet decreed that the daughters should have a proportionable recompence out of the 6000*l.*

7. One seised in fee of some land, and possessed of other land for a term under lease, devises the fee to *A.* and the term of years to *B.* and dies indebted on bond. Upon a deficiency of assets, they shall contribute proportionably; but if *A.* had been residuary legatee he should have paid the debts.

8. By marriage articles it was agreed that 6000*l.* in trustees hands should be laid out in land to be settled

settled on the husband for life, remainder to the wife for life for her jointure; remainder to the first, &c. son of the marriage in tail male, successively chargeable with 2000 *l.* for younger children, remainder to the husband in fee. The marriage took effect, and 6000 *l.* being vested in lottery annuities, was by consent of the husband and wife laid out in *South-Sea* stock, by which a loss of 3000 *l.* happened. On a bill by the only son of the marriage and four infant daughters against the trustees for an execution of the trust, decreed the son to bear two-thirds of the loss, and the younger children one-third, (according to their proportions,) and referred to a master to have a settlement made accordingly.

pl. 60. 1 *Eq. Abr.* 115. pl. 16.
2 *Eq. Abr.* 224. pl. 7.
2 *Eq. Abr.* 35. pl. 4. S. C. but
not S. P.

9. Lease of a coal mine, reserving rent. *A.* the lessee declares himself a trustee for five persons, to each a fifth. The five partners enter upon the work and take the profits of the mine, which afterwards becomes unprofitable, and the lessee insolvent. Decreed, that the *cestui que trusts* should contribute each one-fifth towards satisfying the plaintiff the arrears of rent that had incurred during the time they had concerned themselves in taking the profits.

M. 1735, cor. Jekyll, M. R.
Clavering v. Wesley, 3 P. Wms.
402. & vide note.
Vide Chancellor v. Poole,
Doug. 735.
In Lib Reg. A. 1735, fo. 226.
S. C. nomine *Clavering v. Reed*.

10. A church lease for three lives was devised in trust for testator's widow for life, remainder to his son in tail, one life expiring during the widow's life. *Quære*, At whose expence should the renewal be made? *Per* Lord Chancellor—Where a legal estate of this kind is devised to one for life, remainder over, and the tenant for life is one of the persons upon whose life the lease is held, there is no reason he should be at any expence in adding another life, because the lease is as durable at his interest. So where it is given *in trust* in same manner, and the *cestui que trust* is one of the lives named in the lease, this court will not compel the trustees to surrender that lease, in order for a renewal at the expence of the *cestui que trust* for life. In the present case the *cestui que trust* for life has a chance of a benefit from the renewal, and the son, who has the remainder in tail, has no more than a chance of benefit; therefore it is but reasonable that the widow should contribute to the expence of the renewal: and as to the proportion, the rule is, that the tenant for life shall pay one-third of the charge, or keep down the interest, and that

2 April 1750, cor. Hardw. C.
Perry v. Perry, 2 Amb. 38.
1 *Eq. Abr.* 117.

Vide Vef. 4:8. S. C. where it is said, the computation of tenant for life bearing one-third was a wrong rule, as being too low.

Vide ante, Rives and Rives, pl. 3. and Nightingale and Lawson, and Stone and Theed, there mentioned.

seems reasonable in this case. The widow accordingly paid one-third the expense.

See more under *Estate, Proportion, Remainder*.

GENERAL REFERENCES.

Ademption, see *Legacy*.

Age—*Infant*.

Agent—*Power and Authority, Trade*.

Aggregate—*Corporations*.

Alderman—*Corporations*.

Amerciaments—*Copyhold, Revenue*.

Ancestor—*Heir*.

Apprentice—*Master and Servant*.

Appendant—*Advowson*, under tit. *Ecclesiastical Persons and Things*.

Appendants to the Freehold—*Matters controverted between Heir and Executor*, under tit. *Executors and Administrators*.

Arrest—*Bail, Contempt, Judgment*.

Arrears of Rent—*Landlord and Tenant*.

Assets—*Executors and Administrators*.

Assessments—*Taxes*.

Assent—*Consent, Executors and Administrators, Legacy*.

A—i

Action.

M. 1732, cor. King, C.
Morrice v. Hankey,
3 P. Wms. 148.

3 P. Wms. 314. (n.)
H. 1730, cor. King, C.
Pakeman v. Colby.

1. A *Scire facias* is not in nature of a new action, but a continuation only of the old one.

2. Where the plaintiff has brought his action at law against the defendant, and has bail, the court of Chancery will not grant a *ne exeat regnum*.

3. Where

Action.

A—i 117

3. Where the motives to an action are unjust, though the cause of action was just, a court of equity will always take this into consideration, though they cannot at law pay any regard to it.

5 June 1741, cor. Hardw. C.
Roy v. Duke of Beaufort,
2 *Atk.* 194.

4. Where a person has a sole exclusive right, which is infringed upon, if an action of trespass will not lie, he may have an action on the case: for the law will not permit a man who has a right to be without a remedy.

4 Aug. 1742, cor. Hardw. C.
Whitcomb v. Hyde, 2 *Atk.* 392.

5. Courts of equity no more than courts of law are obliged to give reasons for their judgments. Though an action be brought for several demands, and a judgment for one only, it is as much a judgment as if there had been a particular determination upon each.

21 Mar. 1747, cor. Hardw. C.
Gregory v. Moleworth,
3 *Atk.* 627.

6. Conveyance or delivery necessary to support general *indebitatus assumpsit*.

T. 1792, cor. Lds. Comra.
Spurrier v. Mayes,
1 *Ves. jun.* 530.

Cases where the plaintiff's remedy is properly at law, see Bill.

Choses in Action, see Assignment, Baron and Feme, Bankrupt, Possibility.

Affidavit.

A—i

Sec. 1. In what Cases, and for what Purposes an Affidavit is necessary.

1. **R**ESolved on a demurrer, that where a man in his bill prays *only* discovery of a deed lost, he must make oath he hath lost it. *Secus*, if he sets forth the loss, and then prays relief.

T. 1682, Cane:
Anon. 1 *Vern.* 59.
Vide 2 *Eq. Abr.* 13. pl. 1. (n.)
Vide 1 *Ch. Rep.* 51.

2. Where a man prays discovery of a bond, he need not swear he has lost the bond, as he must if he prayed relief for the duty.

T. 1683, cor. North, C. S.
Anon. 1 *Vern.* 180.

3. Demurrer, because plaintiff had not made oath of the loss of his deed. *Per cur.*—Such an oath is not necessary on a bill for a discovery only. *Aliter*, where relief is prayed, for the jurisdiction cannot be translated without such oath.

T. 1784, cor. North, C. S.
Godfrey v. Turner, 1 *Vern.* 247.

4. Demurrer, because plaintiff had not made oath of the loss of his agreement. Defendant's coun-

H. 1684, Cane.
Nicholson v. Pattison,
1 *Vern.* 310.

fel insisted plaintiff had the writing, and had razed it, and thereby destroyed his remedy at law. *Sed non allocat. Per cur.*

H. 1709, cor. Cowper, C. on

Appeal from the Rolls.

Philips v. Carew, 1 P. Wms. 117.

2 Eq. Abr. 11. pl. 3. 159. pl. 2.

180. pl. 1.

Vide Shirley v. E. Ferrers, 3 P. Wms. 77.

T. 1711, cor. Harcourt, C. S.

Sir Thomas Meers v. Lord Steur-

ton, 1 P. Wms. 146.

2 Eq. Abr. 14. pl. 4.

Vide Duke of Hamilton v. Lady Gerrard, Prec. in Ch. 92. *Powell, M. R. v. Lady Dorsett*, 1 Eq. Abr. 13. pl. 2. (n.)

T. 1718, Canc.

Anon. 1 P. Wms. 476.

Vide Salk. 549. and Saunderson v. Clagget, 1 P. Wms. 657.

T. 1719, in Scacc.

Johnson v. Elleker, Bunb. 46.

Vide ante, pl. 1, 2, 3, 4.

3 P. Wms. 142. n.

P. 1720, cor. Parker, C.

Allen v. Pendlebury.

T. 1720.

Anon. Prec. in Ch. 536.

Vide ante.

P. 1723, in Scacc.

Rex v. Taylor and another,

Bunb. 128.

M. 1728, cor. King, C.

Hornby v. Pemberton, Mosf. 58.

5. Bill to perpetuate testimony will not lie before trial, without affidavit that witnesses are infirm and unable to travel.

6. A peer puts in his answer upon his honour, but as to all affidavits, or where he is examined as a witness, he must be upon oath.

7. Chancery will grant a prohibition in vacation, on an affidavit that the matter did arise in an inferior jurisdiction; but an affidavit not necessary if it appears by the declaration.

8. An affidavit must be annexed to a bill for the discovery and establishing of deeds only, that the plaintiff has not the original deeds, &c. but if relief be prayed, an affidavit is not necessary.

9. Where a master reports any thing as admitted by either of the parties, which report is afterwards excepted to, the report must *prima facie* be taken to be true, and requires at least an affidavit to falsify it.

10. When a bill is exhibited for a general discovery of deeds, it is not necessary for plaintiff to annex the usual affidavit that he has them not in his custody.

11. Affidavit that the crown's debt is in danger of being lost, shall be made, to ground an immediate extent.

12. Plaintiff resident in *London* filed a bill for a discovery, account, and injunction against defendant at *Constantinople*. Defendant set forth by answer the particulars of all books, papers, and writings, and offers to produce them on oath at *Constantinople* to any person plaintiff should appoint, and to let him have copies. Lord Chancellor thought plaintiff's demand unreasonable, and defendant's offer sufficient; and directed that defendant should produce upon oath all books, papers and writings to plaintiff's appointee at *Constantinople*, and that the affidavit should be settled by a master, and

and sworn before the consul or ambassador abroad.
The copies to be at plaintiff's charge.

13. If the plaintiff seeks to be relieved in equity, on the matter of a deed, he must make oath of the loss of it; but not, if he pray only a discovery, or to have it produced at a trial, or the like.

180. 247. 310. *Dormer and Fortescue*, 3 Atk. 132. 1 Vern. 59. cont. *Curf. Cancell.* 40. 217.
227. 229. 231. *Nelf. Rep.* 301. *et vide ante*.

Note; In 2 P. Wms. 541. this case is named *Whitchurch v. Golding*.

14. If a bill is brought to be relieved against a deed fraudulently cancelled by the defendant, and to have another deed executed; the plaintiff need not make oath of the loss of the deed, because he could have no remedy at law, though the deed was in his hands.

T. 1729, cor. King, C.
Whitworth v. Golding,
2 P. Wms. 541. *Mof.* 192.
1 *Eq. Abr.* 14. pl. 4.
Vide Nelf. Rep. 8vo. edit. 78,
79. 1 Ch. Ca. 11. 1 Vern.

T. 1729, cor. King, C.
King v. King, *Mof.* 192.
1 *Eq. Abr.* 14. pl. 4.
Vide 1 Vern. 310.
Vide Whitworth v. Golding, ante.
Vide 1 *Eq. Abr.* 13. pl. 1. S. P.
and notes.

15. Upon a bill of interpleader against the attorney-general and the executors of Sir R. K., it was agreed *per cur.* that there is a necessity of annexing an affidavit to the bill, or else it is demurrable to.—*Quere*, if necessary where only private persons are defendants?

P. 1731, *Canc.*
Errington and Attorney-General
& al. *Bunb. Rep.* 303.
2 *Eq. Abr.* 14. pl. 6.

16. Where a bill is merely for the discovery of a deed, or for producing it at law, no affidavit is necessary; otherwise where the plaintiff wants to change the jurisdiction from a court of law to a court of equity.

28 April 1744, cor. Hardw. C.
Dormer v. Fortescue, 3 Atk. 132.

17. A commission to examine witnesses abroad, cannot be obtained without an affidavit of materiality, although the suit is merely to obtain evidence to support an action.

T. 1793, in *Scacc.*
Anon. 1 *Anstr.* 201.

18. A bill for discovery of the contents of a lost deed, and to have a new one executed, must be accompanied by an affidavit of the loss of the former.

H. 1797, in *Scacc.*
Rootbam and others v. Dawson
and others, 3 *Anstr.* 259.

See more under *Bill; Deeds*.

Sec. 2. In what Cases, and for what Purposes an Affidavit is allowed to be read.

1. IN account between a gardener and a seedsmen, the seedsmen's own oath is allowed as to matters under 40 s.

practice for defendant to discharge himself of matters under 40 s. by his own oath, but plaintiff shall not be allowed any thing on his oath.

M. 1690, *Canc.*
Marshfield v. Weston, 2 Vern. 176.
1 *Eq. Abr.* 11. pl. 17.

Note; It is now the established

22 Jan. 1717, cor. Delegates.
Williams v. Lady Bridget Osborne,
 1 Stra. 80.

2. The question below was, whether *M. W.* was married to Lady *B. O.*, the minister having formerly confessed the marriage extrajudicially, but now denying it upon oath. By reason of the variety of evidence the judge required the oath of the party, (called by civilians the *suppletory* oath,) that he was really married. It was admitted that the acceptance of this oath lies in *arbitris judicis*, and it is only used where there is but what the civilians esteem a *sempilena probatio*. If the evidence does not amount to a *sempilena probatio*, it is never granted, because the oath is only confirmation of evidence. Upon the court of arches admitting *M. W.* to his *suppletory* oath, lady *B. O.* appealed to the delegates; and the questions before them were, whether the *suppletory* oath ought in any case to be administered to enforce a *sempilena probatio*? and admitting it might, whether the evidence in this case amounted to a *sempilena probatio*, so as to entitle *M. W.* to pray that his *suppletory* oath might be received? *Per cur.*—Though in the present case there is no positive conclusive evidence, yet it amounts to a *sempilena probatio*, and consequently the dean of arches did right in admitting *M. W.* to his *suppletory* oath. Appeal dismissed with 150*l.* costs.

H. 1718, in Scacc.
Bennett v. Loggan, Bunb. 35.

3. An affidavit was produced, verifying the allegations in the bill, in order to get an injunction, which was admitted to be read.

H. 1721, in Scacc.
Rex v. Barnfield, Bunb. 103.

4. Upon an affidavit that an outlawed person is dead, the attorney-general allows the plea, that the party outlawed is dead.

P. 1734, cor. Talbot, C.
Gibbs v. Cole, 3 P. Wms. 255.
 2 Eq. Abr. 14. pl. 2.
Vide Countess of Strathmore
 v. Bowes, cor. M. R. in July
 1786, 3 P. Wms. 255. (n.)
Ryder v. Bentham, Attorney-
 General v. Bentham, Isaacs v. Humpage, 3 Bro. Ch. Rep. 463. and 1 Vef. jun. 427.

5. Affidavits allowed to be read for a patentee of a new invention, upon a motion to dissolve an injunction on coming in of the answer, on account of the great prejudice which would arise to the patentee, were the injunction to be dissolved.

3 P. Wms. 313.
 cor. Trevor, M. R.
Lloyd v. Cardy, Prec. in Ch. 171.

6. A precedent of a *ne exeat regnum* being granted on affidavits, though there was no bill in court whereon to ground the writ.

3 P. Wms. 255. (n.)
 11 July 1786, cor. M. R.
 Countess of Strathmore v. Bowes.
Vide Isaacs v. Humpage, 3 Bro.
 Ch. Ca. 463. 1 Vef. jun. 427.

7. Motion to dissolve an injunction after answer, his Honour directed the motion to stand over till precedents might be found where the court had permitted affidavits to be read in support of the injunction. On this day *Gibbs* and *Cole* in *P.*

1734,

1734, *Ryder and Bentham* in T. 1750, and Attorney-General and *Bentham* in T. 1755, were cited as cases in point. His Honour said, that as well upon the precedents as the reason of the thing the proceeding was proper, but would not decide without consulting Lord Chancellor. Afterwards the defendant consented that the affidavits should be read, and they were read accordingly.

8. In this case affidavits contradicting the answer were allowed to be read in support of an injunction on the merits; the bill charging fraud in obtaining a verdict at law, and that the assets of the testator were wasting.

H. 1792, cor. Buller, J. abf. C. *Joane v. Humpage*, 3 Bro. Ch. Ca. 463. 1 Ves. jun. 427.
Note; Mr. Justice Buller compared this to cases of waste or patents, where an immediate interference is necessary, and cited *Robinson v. Lord Byron*, 1 Bro. Ch. Ca. 588.

9. In a motion for an injunction the plaintiff cannot read affidavits to contradict the answer, according to the practice of the court of Exchequer.

H. 1796, in Scacc. *Summerville v. Buckler*, 3 Anstr. 658.

See more under *Evidence, Injunction*.

Sec. 3. In what Cases, and to what Purposes an Affidavit shall be deemed sufficient and regular, and where it shall be considered as evasive.

1. *In odium spoliatoris* the oath of the injured party sufficient evidence to charge the wrongdoer.

M. 1683, cor. North, C. S. *Childern v. Saxby*, 1 Eq. Abr. 15. pl. 2. 229. pl. 11. 1 Vern. 207.

H. 1684. *East India Company v. Evans & al.* 1 Vern. 308.

2. An accountant shall be allowed sums under 40 s. on his own oath, but then in his affidavit he must mention to whom paid, and for what and when.

M. 1684, cor. North, C. S. *Anon.* 1 Vern. 283.
Vide *Marthfield and Weston*, 1 Eq. Abr. 11. pl. 14. and ante, f. 2. pl. 1.

3. So that the whole does not exceed 100 l.

N. B. The Lord Chancellor was not satisfied with this rule, and said he would consider how to rectify it.

T. 1687, cor. Jeffries, C. *Whickerley v. Whickerley*, 1 Vern. 470.
1 Eq. Abr. 11. pl. 13.

4. Defendants made affidavits that they had no books, evidences, &c. to their knowledge concerning the matters in question, but what were produced before the Master, and annexed to a schedule. This is evasive; and they were put to swear, that they had no books or evidences concerning the matters in question, but what they had already provided.

10 June 1713, Canc. *Mayor, &c. of Hertford v. the Poor of Hertford*, 4 Vin. Abr. 440. pl. 10.
2 Eq. Abr. 14. pl. 1.

5. Where

H. 1740, cor. Hardw. C.
Burton v. Maheen,
 Barn. Rep. 401. 403.
 2 Eq. Abr. 14. pl. 3.

5. Where the court orders the affidavits on both sides shall be sworn within a limited time, and some of the affidavits on one side are not sworn within the time mentioned in the order, the court will not enlarge the order, for the neglecting party is precluded according to the established rule of the court.

27 Oct. 1740, cor. Hardw. C.
Ayliffe v. Murray, 2 Atk. 60.

6. The not swearing expressly to words spoken, but adding to that effect, is a proper caution in an affidavit.

22 Oct. 1750, cor. Hardw. C.
Ex parte Lord, 2 Ves. 26.

7. Upon contradictory affidavits of the same person, personal examination is required.

9 Aug. 1754, cor. Hardw. C.
In re Hogan, a Lunatic,
 3 Atk. 813.

8. Where affidavits were taken before a person who was a solicitor in the cause, *they were not permitted to be read*, but the petition was dismissed, and the costs directed to be paid by the solicitor who took the affidavits.

M. 1796, in Scacc.
Longman and others v. Calliford,
 3 Anst. 807.

9. After an order nisi to dismiss for want of prosecution the plaintiff filed a replication, and afterwards moved to withdraw the replication and amend, on affidavit of materiality. He must also shew why the facts introduced by the amendment could not have been stated before.

See more under *Evidence*.

A—i

Alien.

M. 1699, in Scacc.
Attorney-General v. Weedon and another, Parker, 267.

Vide Page's case, 5 Co. 52.
 19 Ed. 4—6. Toomes, Administrator, v. Hethington,
 1 Saund. 361. Rast. Ent. 605.
 2 Rol. Abr. 399. 8 Rep. 170.
 9 Ed. 3. c. 1. 14 Ed. 3. c. 2.
 Freem. Rep. 39.

1. CHOSSES in action belonging to an alien enemy are forfeited to the crown, but there must be a commission and inquisition to entitle the king, and a peace before inquisition discharges the cause of forfeiture.

Tourson's case, 1 Inst. 118. Magn. Chart. c. 30. 2 Inst. 58.
 2 R. 3. 2. 1 Rol. Rep. 175. 3 Bulst. 27. *Rex v. Williams*, 3.

24 Nov. 1737, cor. Hardw. C.
Rankinsseat v. Barker & al.
 1 Atk. 50.

2. A bill brought for an account against the representatives of an *East India* governor, who pleaded that plaintiff was an alien born, and an alien infidel, and could have no suit here. Plea over-ruled; for, being a mere personal demand, the plaintiff may bring a bill in this court.

3. The

3. The persons of foreigners are subject to the authority of this court only while in *England*; but though their persons are out of the reach of the court, the property they have in the funds is under its controul.

21 Dec. 1737, cor. Hardw. C.
Anon. 1 Atk. 19.

4. The court directed a commission to the *East Indies* to take the answer of the defendant to the cross bill, who was of the *Gentoo* religion, and empowered two or three of the commissioners to administer the oath in the most solemn manner, as in their discretion should seem meet; and if they administered any other oath than the Christian, to certify to the court what was done by them; that if there should be any doubt as to the validity, the opinion of the judges might be taken.

4 Dec. 1739, cor. Hardw. C.
Ramkissenfat and others v. Barker
3 al. 1 Atk. 19. 21.

S. C. The court will not stay proceedings in an original cause till the answer come in to a cross bill, but will only stay publication. *Secus* if cross bill brought before answer put into the original bill.

5. In the plea of an alien, unless it is averred the person was an alien, it is no bar.

7 Aug. 1742, cor. Hardw. C.
Burk v. Brown, 2 Atk. 397.

S. C. An alien may take by purchase, but then it is for the benefit of the crown.

S. C. There is no instance where it has been held, that a person, by marrying an alien woman, is seised of the estate purchased by her, for her possession must be for the benefit of the crown.

6. The depositions of witnesses of the *Gentoo* religion, sworn according to their ceremonies, ought, upon the special circumstances of the case, to be read as evidence in a cause.

M. 1744, cor. Hardw. C.
cum *Affist.*
Omyebund v. Barker, 1 Atk. 21.
2 Eq. Abr. 397. pl. 15.

S. C. Heathens have been admitted as witnesses by the civil law, by the law of nations, and by the common consent of mankind.

Vide Ld. Stair's Inst. 694.
In *Fachina v. General Sabine*,
a Mahometan was sworn upon the
Koran, 2 Stra. 1104. A Ma-

hometan may be a witness in a prosecution for a capital offence. *Vide* John Morgan's case, Leech's case, Cro. Car. 58.

S. C. A Jew is a competent witness to prove a murder.

S. C. By the policy of all countries oaths ought to be administered to persons according to their own religious opinions, and laying the hand on the book, was originally borrowed from the Pagans.

Vide Selden, T. 2. 1467.
Voet's Pand.

S. C. That Turks and infidels are *perpetui inimici*, and therefore not to be admitted witnesses here, is a common error, founded on a groundless opinion of Justice *Brooke*.

Vide Calvin's case, 7 Rep. 17.
Stat. 21 H. 8.
Littleton's Readings on Stat.
27 Ed. 3. 17. MS. Salk. 46.

S. C. The

Vide Wells v. Williams,
1 Raym. 282.

S. C. The necessity of trade has mollified the too rigorous rules of the old law in their restraint of aliens.

S. C. A Jew may bring an action now, though held otherwise formerly.

Vide Lord Vaughan, fo. 37, 38.

S. C. The law of *England* is not confined to particular cases, but governed more by reason than any one case whatever.

S. C. If alien witnesses were here, they would be liable to a prosecution for perjury, and might be indicted upon a special indictment.

Vide West's Symb. 2 part, tit.
Indictment, f. 160.

S. C. *Tactis sacris Evangeliiis* not necessary words in an indictment of perjury; for several old precedents are, that the party was *juratus*, generally.

S. C. Some infidels may, under some circumstances, be admitted as witnesses.

S. C. The Jews, before their expulsion from *England*, and since their return to it, have been constantly admitted as witnesses.

Vide Calvin's case, 7 Rep. 17.

S. C. Oaths are not of the Christian institution, but as old as the creation.

S. C. If infidels do not believe a God, or rewards and punishments hereafter, they ought not to be admitted as witnesses.

Alkop v. Bowtell, Cro. Jac. 541.

S. C. The rule of evidence is, that such ought to be admitted as the necessity of the case will allow of; but though admitted, it must be left to the persons who try the cause to give what credit to it they please.

S. C. Where alien witnesses do not believe the Christian oath, they must of necessity be allowed to swear according to their own notion of an oath.

Vide 1 Hale Pl. Cor. 301.
Skin. 647.

S. C. Rules of evidence are to be considered as artificial rules, framed by men for convenience in courts of justice, and founded upon good reason.

S. C. Hearsay evidence cannot be admitted, nor husband and wife as witnesses against each other, in cases of treason; and yet from necessity have been allowed.

Vide Case of Hue and Cry,
Brownl. 47. 2 Rol. Rep. 346.

S. C. The rule, as to admitting evidence in foreign and commercial matters, differs from other instances in a court of justice.

Vide Cro. Car. 365. Prec. in
Ch. 207. Fremoult and Desire,
1 P. Wms. 429. Dockway v.
Dickenson, Comb. 340. 366.

S. C. Lord Chief Justice *Lee* was of opinion, that if the validity of a foreign contract, made in the presence of a public notary, was in question here, his testimony would be allowed to authenticate the contract.

Vide 1 Salk. 281.

S. C. Cases have been determined at law upon evidence taken from histories of countries.

S. C.

S. C. The essence of an oath is an appeal to the Supreme Being, as thinking him the rewarder of truth and avenger of falsehood; and Lord Coke is the only writer who has grafted the word Christian into an oath.

Vide Bp. Sanderfon de Juris-juramenti Obligatione.
Vide same author, p. 5. 13.
Puffend. l. 4. c. 2. §. 4.
Tillotson's Sermon. 1 vol. 189.

S. C. The outward act not essential to the oath, for this was always matter of liberty.

Tillotson's Sermon. 1 vol. 144.

S. C. An absolute necessity, the first ground for departing from strict rules of evidence; a presumed necessity the second.

Vide 1 Mod. 4.

S. C. Courts of law here will give credit to the sentence of a foreign court of admiralty, and take it to be right without examining their proceedings.

Vide Beak v. Tyrrel, Carth. 31.

S. C. If a heathen, not an alien enemy, brings an action, and the defendant a bill for an injunction, he shall be admitted to answer according to his own form of an oath.

S. C. Framers of indictments multiply words to no purpose, therefore the old precedents are the best; and by them it appears, *supra sanctum Dei Evangelium* are not necessary words in indictments for perjury.

S. C. The case of the *East India* Company and Admiral *Matthews* in the court of Exchequer is misstated; for there is no such thing as sending one judge out of a court to the judges of another upon a point of evidence.

7. A person, suggesting to be an alien in an information exhibited for the king, must answer whether he be an alien or not, and cannot demur to a discovery.

H. 1752, in Seacc.
Attorney-General v. Rofs,
Dupleffis & al. Parker, 144.
A Papist not bound to discover whether he is so or not. *Vide* Smith v. Read, 3 Bacon Abr.

799. An outlaw bound to discover his estate for the benefit of the crown. *Vide* the Protector v. Lord Lumley, Hardr. 22.

8. By the known law of the land, no alien born can take by grant, devise, or other purchase, any freehold or chattels real for his own benefit, but can and does, in such cases, take for the benefit of the crown; yet this disability being neither a penalty or forfeiture, the alien cannot demur to an information filed for discovering the place of his birth, in order to establish the fact of alienage.

13 Mar. 1753, Dom Proc.
Dupleffis v. Attorney-General,
5 Bro. P. C. 91. 2 Ves. 286.

9. On an information being filed against a person who had been in the service of the *East India* Company abroad, for an account of his dealings and transactions, the defendant pleaded that he was an alien; but the plea was over-ruled, it appearing that the defendant had acted both in a

22 May 1773, Dom. Proc.
Bolts v. Attorney-General,
7 Bro. P. C. 35.

civil and judicial capacity, and had taken the oaths of allegiance, &c.

T. 1794, in Scacc.
Daubigny & al. v. Davallon
& al.

Vide Stamf. Prerog. 39. Dy. 2.
Rast. 405. 252. 1 Show. 349.
Lit. S. 198.

10. Plea of alien enemy to a bill of discovery is good.

S. C. In such a plea it is sufficient to state the war subsisting with *France*, and that the plaintiffs are *Frenchmen, aliens, and enemies* of the king.

See more under *Answer, Demurrer, Evidence, Plea.*

A—i

Assignment and Assignee.

Sec. 1. Of what Things an Assignment may be made, and where the Assignee is or is not liable.

T. 1690, cor. Lds. Comrs.
Woodman v. Blake, 2 Vern. 166.
1 Eq. Abr. 109. pl. 6.

In 2 Vern. 222. this case is differently stated. Nothing is there said about the daughter's assignment. The question there is whether the court can enlarge the time for payment, notwithstanding the devise over. *Vide* post, tit. Condition.

M. 1697, cor. Somers, C. S.
Anon. Comyn, 43.
2 Eq. Abr. 85. pl. 3.

Vide Dougl. 3 ed. 636. Cunningham. Bills of Exch. 119. *Reynolds v. Dundas*, 1 Term Rep. 40. 2 Term Rep. 71. 2 Atk. 182. Bull. N. P. 274. *Morris v. Lee* in B. R. H. 26 Geo. 3. *Vide* Bayley's Bills of Exch. 69. 74.

1. ONE settles lands so that in case his eldest daughter paid 6000*l.* within six months after his death to the use of his other daughters she should have the lands, but if she failed, the second daughter to have the like privilege. The six months being past without payment, whether the eldest daughter can assign over this privilege to a creditor? *Curia advisare vult.*

2. A bill of exchange was given by *A.* for value received. *B.* assigns it to *C.* for a just debt; *C.* brings an *indebitatus assumpsit* on this bill against *A.*, and had judgment. *A.* brings his bill to be relieved against this judgment, because there was really no value received at the time of giving this bill, and *C.* would have no prejudice, who might still resort to *B.* upon his original debt. It was insisted that *A.* might be relieved against *B.*, or any claiming as servant or factor of or to the use of *B.* But *Somers, C. S.* held, that *C.* being an honest creditor, and coming by this bill fairly for the satisfaction of a just debt, he could not relieve against him, because it would tend to destroy trade, which is carried on every where by bills of exchange; and his lordship would not lessen an honest creditor's security.

3. One.

3. One being in an undue manner drawn in to execute a conveyance of his estate after makes his will, and thereby devises all his land to be sold for payment of his debts. Held, that his creditors may set aside the conveyance, having a right in nature of an equity of redemption as the testator himself had, which may be assigned, though urged that it was in nature of a *chose en action*, and not assignable.

H. 1700, cor. Wright, C. S. and M. R.
Blake v. Johnson,
Prec. in Ch. 142.
2 Eq. Abr. 86. c. 5. 260. c. 1.
371. c. 11. 479. c. 6.

4. A remainder of a term is an assignable interest, as if J. G., being possessed of a term of 2000 years, devised the estate to his wife for 50 years, if she should so long live; and after her decease to his son for 50 years, if, &c. and after his decease to his two grand-children for the remainder of the term. One of the grand-children assigns his interest in the life of the father or grandmother. *Per cur.*—This is an assignable interest, and a moiety passed by the assignment. So decreed.

T. 1700, cor. M. R.
Kingstader v. Courtney,
2 Freem. 238.
2 Eq. Abr. 86. c. 4.
Kimpland v. Courtney, 2 Freem.
250. seems to be the same case.
Vide Lampett's case, 10 Co. 51.
though this is a stronger case
than *Lampett's*.
Kide Sheriff v. Wrotham,
2 Cro. 509.

5. A seaman assigns his wages to J. S. as a security for a debt he owed to J. S., and died intestate. It was insisted that this was only in nature of a letter of attorney, and died with the person, and that there were bond debts. Decreed J. S. shall be paid in course of administration.

M. 1700, cor. M. R.
Mitchell v. Eades, 2 Vern. 397.
1 Eq. Abr. 45. pl. 6. Prec. in
Ch. 125. Where it is stated that
the seaman made a letter of attorney
and not an assignment; yet same
resolution.
Vide 2 Vern. 595.

6. Husband assigns a mortgage in fee, or a *chose en action*, which he has in right of his wife. This will not bind the wife if she survives.

M. 1700, cor. Wright, C. S.
Burnet v. Kinnaston, 2 Vern. 401.
Prec. in Ch. 118. 1 Eq. Abr. 69.
pl. 5. 2 Freem. 239.

Vide 2 Vern. 68. Gilb. Rep. 98. 2 P. Wms. 111. Ca. Temp. Talb. 168 to 170. 1 Atk. 280. 459. 2 Atk. 207.

7. A possibility cannot be assigned *, but it may be released; for it is unreasonable there should be an incumbrance on any man's estate which cannot be discharged.

M. 1706, cor. Cowper, C. S.
Thomas v. Freeman, 2 Vern. 563.
1 Eq. Abr. 46. pl. 12.
* A possibility may be both
released and assigned. *Vide Hig-*
den v. Williamson, 3 P. Wms.

132. & vide Notes to *Jewson v. Moulson*, post, tit. Baron and Feme, sect. 9.

8. A *chose en action* is assignable in equity upon a consideration paid.

M. 1707, Canc.
Crouch v. Martin & al.
2 Vern. 595.

S. C. A seaman assigns his wages as a security for money, and dies indebted to other persons. This assignment specifically binds the wages, and the money secured thereby shall be paid preferable to all other debts.

9. A. by will gives 300*l.* to a feme covert without creating any separate trust of it, made payable out of a reversion of land expectant on an estate

M. 1714, Canc.
Atkins v. Dawbury,
Gilb. Eq. Rep. 88.
1 Eq. Abr. 45. pl. 9.

Vide 1 Ch. Ca. 232. 3 Ch. Rep. 90. 1 Roll. Abr. 380. 2 Vent. 362. 2 Vern. 391. 428. 563. 595. 764.

estate for life. The legatee's husband makes an assignment of this legacy to trustees for the benefit of his children; and after by will, taking notice of the legacy, devises it in like manner for the benefit of his children, and makes his wife executrix, and dies. The estate for life drops, and the widow applies to the executor of the first testator for the 300*l.* legacy. The widow and executor come to an agreement that she should accept of 200*l.* in full, and the land was sold. The widow joined in the sale, and the 200*l.* was paid, and the widow gave a release. Bill brought by the children for the 300*l.* legacy under their father's assignment and will. Decreed that the husband had a power to extinguish or release the legacy, and had made a good assignment in equity, (though not at law as a *chose en action* only,) which, he confirming by his will, had bound his wife the legatee. The widow, giving no notice of this assignment to the executor, should be answerable for the 200*l.* to the children: but as to the 100*l.*, which the executor had drawn her in to release, he should stand charged, for he ought at first to have paid the whole legacy; and though this legacy was charged on a fund which was not immediate for raising it, yet, being given to the wife *in presenti*, when the fund comes in it shall carry interest from testator's death, which must likewise go to the children.

M. 1719, cor. Parker, C.
Wind v. Jekyl and Albome,
1 P. Wms. 574.
Vide Pollexf. Rep. 44. Veisy
v. Pinwell, this point determined
16 Car. 1.

Note; That a possibility of a term is assignable for a good consideration. *Vide* Theobald v. Duffay, in Dom. Proc. Mar. 1729, 30. Higden v. Williamson, 3 P. Wms. 132. Fearn's Cont. Rem. 439.

T. 1731, cor. King, C.
Duke of Chandos v. Talbot,
2 P. Wms. 608.
2 Eq. Abr. 89. pl. 13. 253. pl. 12.
Vide Jacob v. Williams, 1 P.
Wms. 385. Higden v. Wil-
liamson, 3 P. Wms. 132. Theo-
bald v. Duffay, 9 Mod. 101.
Beckley v. Newland, 2 P. Wms.
182.

T. 1733, cor. King, C.
Lord Carteret v. Pufelbal,
3 P. Wms. 199.
2 Eq. Abr. 89. pl. 15, 16. *This*
decree was affirmed in the Lords,
4 Bro. P. C. 168.

10. A devisee in remainder of a term articles for a valuable consideration to sell it. This is a good assignment in equity, and the devisee in remainder is afterwards a trustee for the purchaser.

11. A *chose en action* though not assignable at law, yet is so in equity, where the husband may assign it alone, as he may any other part of the wife's personal estate; so may a contingent interest, which the husband has in right of his wife, or a possibility of a term, which though not good strictly by way of assignment, yet will operate as an agreement where for a valuable consideration.

12. A man possessed of a *chose en action* in his own right may assign it, though without any consideration.

But

But a baron possessed of a *chose en action* in right of his wife cannot assign it, unless for a valuable consideration, and yet he may release it.

S. C. If the wife has a judgment, and it is extended upon an *elegit*, the husband may assign it without a consideration: so if a judgment be given in trust for a feme sole who marries, and by consent of her trustees is in possession of the land extended, the husband may assign over the extended interest; and by the same reason, if the feme has a decree to hold and enjoy lands until a debt due to her is paid, and she is in possession of the land under this decree, and marries, the husband may assign it without any consideration, for it is in nature of an extent.

13. 3000*l.* was to be raised by a trust-term in a marriage settlement for portions of daughters as should be living, and not advanced by the father at his death. There being several daughters, B., one of them, after she came of age in the lifetime of her father, and whilst she was unmarried, releases all her share in the 3000*l.* to the owner of the inheritance. B. marries, the father dies, and a bill is now brought by her as in her right to have her share, &c. Defendant pleads the release in bar, and insisted that this share of B., though a possibility only at the time of the release, was assignable in equity, though not at law; and by the same reason might be released in equity, and that possibilities are assignable in equity. Lord Chancellor said, that *chores in action* and possibilities are assignable in equity if made upon consideration; but here no consideration appears, and at law a possibility may be released, but this is a demand in equity under a trust, and therefore shall be supported by a consideration; and ordered the plea to stand for an answer.

14. A. by his will gave two legacies to his daughter B. of 500*l.* each, one of them for her sole and separate use, she being married without a settlement. A decree was obtained for placing out these legacies for B.'s benefit. B.'s husband, upon petition to Lord Macclesfield, obtained an order (his wife consenting) for one 500*l.*, and the other 500*l.* by consent to be laid out for the separate use of the wife. The husband and wife (she being nineteen) join in an assignment of the last 500*l.* to secure a debt to D., and the husband becomes a bankrupt. D. brought a bill against the assignees under the commission, and also against the husband and wife;

Vide Bennet v. Kinafton,
2 Vern. 401.

Cleland and Cleland, Prec. in Ch. 63. Blois and another v. Lady Hereford, 2 Vern. 501. Packer v. Windham, Prec. in Ch. 412. 1 Roll. Abr. 358. Sir Edw. Turner's case, 1 Vern. 7. Tudor v. Samyne, 2 Vern. 270. Squib v. Wynn, 1 P. Wms. 378. *Vide* Notes to Jewson and Moulson, post, tit. Baron and Feme, sect. 9.

H. 1734, cor. Talbot, C. *Robinson v. Bawson,*
3 Vin. Abr. 155. pl. 29.
2 Eq. Abr. 90. pl. 18.
Vide Ld. Gray v. Dukes of Hamilton, 3 Vin. Abr. 155. pl. 28. 2 Eq. Abr. 88. pl. 11. Theobald v. Duffay, 1 P. Wms. 574. (n.) Higden v. Wilkin-son, 3 P. Wms. 132.

T. 1734, cor. Talbot, C. *Halsey v. Badbum,*
2 Eq. Abr. 154. pl. 19.
Vin. Abr. tit. Baron and Feme,
E. 2. 7. Ca. 12.

and Lord King decreed the *assignment good*, and the *residue to be paid to the assignees*. The wife rehears, alledging that she was poor, and not able to produce the order of Lord Macclesfield. Objected that the order was voluntary, and did not bind creditors; objected also that the assignment was good, it being of her separate estate, though under twenty-one, and that *infants may execute a power by an attorney*. Lord Chancellor—As to the objection that the order was voluntary, and did not bind creditors, he said, that is a hard censure on the proceedings of the court, and such settlements are usual practice, and this present one is according to the will. Where the husband makes a voluntary provision for the wife to take place after his death, it has been adjudged fraudulent; but *here it is set apart immediately*. As to the assignment itself, he admitted, that if the *feme had been sole it had not been good*: but the case is stronger, *because she was a feme covert*; and though in cases of mere powers or authorities infants may execute, *because nothing moves from them*, yet this is an interest, and *can no more be departed with in equity by an infant, than by an infant's assignment of a legal estate at law*. Decreed varied.

2 May 1742, cor. Hardw. C.
Valliant v. Dodemede, 2 Atk 546.

Vide 2 Stra. 1221. in *Lekeux v. Nash*, where Lee, C. J. grounded his opinion on this and another similar case in his charge to the jury.—In some sorts of assignments made by tenants, the court has interposed. *Vide* Treacle v. Coke, 1 Vern. 165. *Philpot v. Hoare*, 2 Atk. 219.

15. As at law an assignee of a term may assign, and thereby get rid of his subsequent rent, and the covenants which run with the land, *à fortiori* he may do it in equity.

7 May 1743, cor. Hardw. C.
Hawkins v. Obyn, 2 Atk. 549.

16. A husband may dispose of a possibility in equity, if assigned for a valuable consideration; but it must be an assignment of that particular thing, and not rest only on intention and construction of words in a covenant.

27 July 1752, cor. Hardw. C.
Taner v. Iwie, 2 Vef. 469.
Vide *Nugent v. Giffard*, in 1738, cited in *Jacomb v. Harwood*, 2 Vef. 269.

17. An assignee of an executor is not liable to the former acts of the executor, unless there appears to be any thing collusive.

26, 27 July 1797, cor. Loughb. C.
Mildmay v. Folgbam,
3 Vef. jun. 471.

18. Under the constitution of the *Hand-in-Hand Fire Office*, the heir, to whom upon the death of the insured the property being freehold descended, cannot have the benefit of the policy without assignment.

See more under *Baron and Feme*, *Bankrupt*, *Possibility*.

Sec. 2. Where two Assignments are made of the same Thing, which of the Assignees shall hold.

WHERE the thing assigned is only a *chose in action*, though the assignment be without notice, yet, as no legal estate passes, *qui prior est in tempore potior est in jure*.

If there are two executors who are also legatees, and one of them for a valuable consideration assigns part of his *residuum* to A., and afterwards for a valuable consideration assigns his whole *residuum* to the other executor, if both are but *chofes in action*, the first must take place.

See more under *Landlord and Tenant, Mortgage*.

GENERAL REFERENCES.

Accidents by Fire, Tempest, &c. see *Landlord and Tenant*.

Acquiescence—*Consent*.

Action, Choses in—*Baron and Feme, Bankrupt*.

Administration—*Executors and Administrators*.

Admission—*Bill of Discovery, Answer*.

———— upon Surrender—*Copyhold*.

Alienation, Restrictions of—*Landlord and Tenant*.

————, *Copyhold*.

Alimony—*Baron and Feme*.

Arbitration and Arbitrators—*Award*.

Articles—*Agreement, Marriage Settlement*.

———— of Partnership—*Trade*.

Articled Clerk—*Master and Servant*.

Assignee—*Assignment, Bankrupt, Bond, Mortgage*.

T. 1734, cor. Talbot, C.

Tourville v. Neish,

3 P. Wms. 308.

Reg. Lib. B. 1733, fo. 461.

nomine Tourville v. Spelman.

Vide Brace v. D. of Marlborough,

2 P. Wms. 496.

A—o

Account.

Sec. 1. Who are entitled to an Account, against whom it lies, and in what Cases an Account is directed to be taken; *et è contra*.

1. **A** Man shall not account for what he received as a menial servant and paid over to his master.
 H. 1682, Cant.
Anon. 1 Vern. 136.
 M. 1683, cor. North, C. S.
Potts v. Potts, 1 Vern. 208.
 1 Eq. Abr. 6. pl. 7. — *Vide Wagstaffe v. Bedford*, 1 Vern. 95. 2 Vent. 358.
2. One of three part-owners of a ship refuses to set out or navigate the ship. Afterwards the ship was fitted out by the others, and lost in the voyage. The loss shall be borne equally by all three, because he that refused might notwithstanding have had an account of profits.
 H. 1684, cor. North, C. S.
Strilly v. Winsor, 1 Vern. 297.
 1 Eq. Abr. 372. pl. 1.
3. An infant shall have an account of profits against an intruder as against a guardian; but where a verdict has passed against his title, he shall have no account of profits until he had recovered at law.
 H. 1684, cor. North, C. S.
Lord Newburgh v. Bickerstaffe,
 1 Vern. 296.
 1 Eq. Abr. 280. pl. 1.
Vide Falkland and Bertie,
 2 Vern. 342.
4. An account decreed of an intestate's personal estate, notwithstanding an account had been before taken, and a distribution decreed in the spiritual court.
 P. 1688, cor. Jeffries. C.
Biffell & Us. v. Axtell & al.
 2 Vern. 47.
 1 Eq. Abr. 12. pl. 9. 136. pl. 4.
5. Chancery considers an executor (having an express legacy) as a trustee, and will make him account for the surplus. The spiritual court cannot (*for they cannot enforce the execution of a trust*).
 In Canc. after a prohibition granted by B. R. to the Delegates, cor. Somers, C. S.
 M. 1695.
Petit v. Smith, 1 P. Wms. 7.
 Comb. 378. Comyns. 3.
 5 Mod. 247. Raym. 86.
 S. P. determined in *Rachfield v. Careless*, 2 P. Wms. 158. and 1 Stra. 568. *nomine* *Russell v. Carneffe*. *Sed vide* the several distinctions which have from time to time been taken in cases on this subject in *Farrington v. Knightley*, 1 P. Wms. 544.
6. Defendant's aunt lived with her, and being very infirm defendant received her monies. The aunt died intestate, and plaintiff being entitled to a distributive share, brought a bill for an account of the monies received for the intestate. Defendant by her answer set out the several sums, to whom paid, and how applied. The cause being heard

T. 1702, cor. M. R.
Bayly v. Hill,
 1 Eq. Abr. 10. pl. 10.

heard without proof, an account was decreed and referred to a Master. The Master's report charged defendant with the sums confessed to be received, and submitted if they ought not to be discharged by the same answer. *Per cur.*—Referred back to the Master for defendant to prove her answer. If disproved, no credit should be given to it in other particulars; if otherwise, the court inclined it should be a discharge as well as a charge.

7. *A.*, governor of one of the *Bahama Islands*, near which a *Dutch* ship richly laden was cast away, on pretence of recovering the cargo for the seamen, seized it all to his own use as wreck-fishing. On his return to *England* was decreed to account for the whole.

19,000*l.* had been decreed against him, for non-payment of which he was committed.

19 Nov. 1702, Dom. Proc.

Trott v. Le Clé and others,

Colles' P. C. 219.

Prec. in Cb. 250. S. C.

where it appears that a *net excess regno* had been awarded against defendant, to which he had given bail, and that on the hearing,

8. *A.* appoints *B.* his deputy in the execution of an office, and by articles it is decreed, that *B.* shall account with *A.* for all fees, &c. according to the table of fees belonging to the office, and pay him three-fourth parts thereof, and retain the other fourth part for his trouble. Certain fees are received by *B.*, which he insists upon being solely entitled to, because not contained in the table. But it was held, that *B.* should account with *A.* for all fees ascertained by the table according to the table, and for all fees not mentioned therein according to his receipts; and pay over three-fourths of the whole to *A.*

7 Dec. 1704, Dom. Proc.

Machen and another v. Stanyon,

1 Bro. P. C. 87.

9. Where, on a bill to call a trustee to account, he by answer submits readily to it, though found in debt, shall pay interest for the balance only from the time of the account liquidated, and no costs. *Secus* if he controverts the account; there, if found in arrear, shall pay interest and costs.

H. 1705, Canc.

Parrot v. Treby, Prec. in Cb. 254.

1 Eq. Abr. 125. pl. 4.

10. *A.* pretending he had a term of 16 years to come in a house, *B.* agreed with him for it, and paid 100*l.*, part of the purchase-money, and the rest was to be paid at another day. *B.* entered, but finding *A.* had only a term of six years, brought his bill to have an account, his money refunded, and his bargain set aside. *B.* decreed to account for the profits, and the 100*l.* to be refunded, and *B.* upon his account to have tenant allowances made him.

T. 1708, Canc.

Long v. Fletcher,

2 Eq. Abr. 5. c. 4.

P. 1709, Canc.
Harrison v. Constantine,
 Eq. Abr. 147. pl. 1.

Account.

§ 1.

11. Plaintiff was the widow of one *H.*, who before her marriage was seised of an estate of 100 *l.* *per ann.* and possessed of several household and other goods. *H.* before marriage entered into articles, wherein he covenanted with his intended wife and trustees, that she should receive the profits of her own estate to her separate use, and that he would give acquittances for such receipts; and that she should have the disposal of all her own by her will or other writing during the coverture. He also covenanted to leave her a legacy of 500 *l.*, and to settle some lands upon her in tail, with a remainder to her right heirs. Both parts of the articles were put into the hands of an indifferent person; and soon after the marriage, the husband demanding his part, which was signed by his wife, the trustees, through a mistake, delivered to him that part which was signed by himself. *H.* then looking upon himself to be free from the agreement, became a very bad husband; and though he and his wife agreed to live in the same house, yet they kept separate tables, and both were maintained at the expence of the husband, who during the coverture received the profits of his wife's estate. Not long before the husband's death, the wife was prevailed upon to join with her husband in passing a fine of some of her own lands. Upon this fine the lands were mortgaged for money which the husband had borrowed, and then settled to the wife in tail, with the fee to the husband. The mortgage money was all repaid, except a very small sum. *H.* conveyed all the land away that he had settled by the articles upon his wife; he then made his will, and died. The widow now brought her bill against her husband's executors, to have an account of the profits during coverture, and for a satisfaction of the goods the husband had consumed. Decreed, that no account should be taken of the estate of the wife during the coverture, nor for the goods consumed by the husband; but if the master shall find any of the goods claimed under the articles, they to be delivered up to the wife, because the husband and wife, notwithstanding the differences, cohabited together; and no complaint was ever made by the wife to the trustees, nor any step taken by her in order to remedy herself. Besides, she was maintained by her husband, and the differences had their interruptions; for at the time when the fine was acknowledged, she was well pleased with her husband, and had forgot all former feuds; there-
 fore

fore no notice is to be taken of what was before, and there is no proof of any difference that arose afterwards. The residue of the articles are to be performed to the widow; and because the lands covenanted to be settled upon her are conveyed away, let lands of equal value be purchased, and the husband's assets chargeable. The executors prayed a direction as to the wife's estate which was mortgaged, and hoped the wife should pay off what mortgage-money remained undischarged. But the husband being the principal debtor, the executors were decreed to pay it.

12. Plaintiff's bill suggested that defendant had lent him money, and that he had trusted the defendant to compute the interest; that there was a miscomputation, and that plaintiff had paid more than was due; therefore the bill prayed that defendant might set forth how much interest was due, and how much was overpaid. Defendant pleaded the statute against usury as to legal interest. Defendant shall not answer as to legal interest, but he shall answer to what he did receive more than the interest; for shall not a mortgagor have a bill against the mortgagee to account and discover how much he hath received more than the interest and principal, which is the same case with this? The plea was over-ruled as to all but the words *legal interest*.

13. An administrator of a captain of a company of marines is entitled to an account as well of the pay of the company as of the personal pay of the captain and his servants.

H. 1711, cor. Cowper, C. S.
Bellasis & Ux. v. Churchill and another, 2 Vern. 682.
1 Eq. Abr. 6. pl. 8.

14. A captain of a trading vessel died, leaving money on board to be improved in trade; the mate becomes captain; he is liable not for the interest only, but the profits, having reasonable allowances made to him for his care.

P. 1711, cor. Harcourt, C. S.
Brown v. Linton, 1 P. Wms. 140.
10 Mod. 20.
2 Eq. Abr. 5. pl. 5. 722. pl. 2.
Vide 15 Vin. 348. Watson
on Partnerships, 422.

15. T. lent D. 600*l*. D. assigned a 1-16th part in a ship, and by defeasance it was declared, that plaintiff out of the earnings should pay himself 600*l*., and should account to D. for the overplus gained; but there was no covenant to pay the money. The ship was lost, and plaintiff brought his bill against D.'s executrix for the debt. Defendant denied assets *prater* to satisfy specialty debts. Decreed defendant to account for testator's estate, and plaintiff to account for the earnings,

M 1713, Canc.
Tyrrell v. Lady Thomas,
1 Vin. 183. pl. 5.
2 Eq. Abr. 5. c. 9.

ings, and to be allowed for the outfit of the ship, though she was cast away.

M. 1716, cor. Cowper, C.
Ruckle v. Milman,
 4 Vin. Abr. 129. pl. 8.
 2 Eq. Abr. 6. pl. 10. 138. pl. 3.

16. Bill by the heirs and residuary legatee of *A.* against his widow and executrix for an account of his estate. It was proved that *A.* was very infirm seven years before his death, and though he signed receipts and executed leases, the money was paid to defendant. Decreed defendant to account for what she had received seven years before her husband's death, but the master to be easy in taking the account, and to allow for housekeeping without vouchers.

M. 1716, cor. Cowper, C.
Hutton v. Simpson & Ux.
 2 Vern. 724.

17. Equity will not decree an account of mesne profits, unless in case of a trust or an infant where no entry has been made by the person entitled to the profits.

T. 1717, cor. Tracey, J. abf. C.
Stanley v. Norcliffe,
 7 V. n. Abr. 215. pl. 13.
 2 Eq. Abr. 265. pl. 11.

18. Bill by plaintiff as only child of a freeman, for her share of her father's personal estate. Plaintiff at several times had received several sums of her father in his lifetime, and he had transferred 170*l.* bank stock, in trust for himself, in order to dispose of it by his will to defendants. *Per cur.*—Ordered an account to be taken of what money plaintiff had received from her father in his lifetime, and on what account, and reserved the consideration, whether such money should be taken in part of her customary share, or whether she should have a moiety of her father's estate besides what he had given her in his lifetime, there being no other child. *Curia advisare vult.*

3 P. Wms. 124. n.
Hender v. Rose.
 Cor. M. R. 4 July 1718.
Frederick v. Frederick,
 1 P. Wms. 722.

19. Where the child of a freeman of London is to make his election whether he will abide by the will or by the custom, he is not obliged to elect until after the account taken.

M. 1721, cor. Macclefield, C.
Hollinghead's case,
 1 P. Wms. 742.
 2 Eq. Abr. 2. (n.) pl. 3. 579. pl. 7.

20. After a decree to account, if an executor or administrator does not revive within six years, it is not within the statute of limitations.

H. 1724, Canc.
Scurry & Ux. v. Morfe,
 9 Mod. 89.
 2 Eq. Abr. 168. pl. 17. 232. pl. 7.
Vale 2 P. Wms. 308. Co. Litt. 113. (n.) 3 P. Wms. 33. 331. Mitf. Plead. 144. 146. 220.
Athurst v. Eyre, 2 Atk. 50. 3 Atk. 341. S. C. *Plunkett v. Pynson*, 2 Atk. 51.

21. A person cannot bring a bill for an account against one co-executor without the other, either as residuary legatee or as a creditor.

M. 1725, Canc.
Lucas, Executor of R. A. v. Adams, 9 Mod. 118.
 2 Eq. Abr. 6. pl. 11. 482. pl. 23.

22. The obligor on payment of 20*l.* to the obligee, a weak man, procured a bond and notes for money to be delivered up to him upon pretence that

that he was poor, and nearly related to the obligee, but neither of those considerations being proved, he was decreed to account for the bond and notes.

23. Where one claims an absolute gift of a personal estate by the intestate in his lifetime, and it plainly appears to be a trust, the court will order him to account.

M. 1725, Cane;
Milford & al. v. Lord Herbert
& al. 9 Mod. 113.
2 Eq. Abr. 6. c. 14.

24. Equity will never countenance demands of an unfair nature, as for attending at auctions as a puff to enhance the price of goods; nor will equity suffer them to be set up against just and fair demands. In an account, a cross bill for such purpose; dismissed with costs.

6 Mar. 1726, Dom. Proc.
Walker v. Galscoigne,
Grounds and Rudiments of Law
and Equity, 89.
2 Eq. Abr. 161. pl. 13.
13 Vin. Abr. 543. pl. 12. cited
as from a MS. said to be Lord
Harcourt's.

25. Bill for an account of the produce of 20,000*l.* South-Sea stock, mortgaged by plaintiff to defendant (and after principal and interest paid) to be paid the balance. At the hearing an issue was directed, but upon appeal to the lords the order was repealed, and an account directed for all monies received on the sale of the pledged stock, notwithstanding the day of redemption was past, it not appearing defendant had sufficient stock to answer plaintiff; and after principal and interest satisfied, the residue to be paid, and the stock not sold to be transferred to plaintiff.

M. 1727, Scacc.
Harrison v. Hart, Com. Rep. 393.
2 Eq. Abr. 6. c. 15. (S n.)
Vide *Mercer and Tutt*, 3 Bro.
P. C. 142. *Merrick and Spark*,
Com. Rep. 401.

26. Two persons agreed for the purchase of an estate in moieties, which was subject to several incumbrances, to be discharged out of the purchase-money; one of them had several abatements made to him by some of the incumbrancers, in consideration of his services and friendship, and which were directed should be for his own use; yet on a bill for an account of the rents and profits, the court would not allow him the benefit of these abatements exclusive of the other. Held he must account for them, the purchase being made for their equal benefit, and on a mutual trust.

T. 1728, cor. M. R.
Carter and Horns,
1 Eq. Abr. 7. pl. 13.

27. Lands were devised, in trust, to maintain the infant till twenty-three, and then to account, and pay him the rents, and re-convey the estate to him; but if he died before, to re-convey it to another. The infant is not entitled to an account till twenty-three, for that is a condition precedent, but the surplus profits if he die before go to the heir of the testator, not being devised over, but the infant

M. 1729, cor. M. R.
Tilly v. Simpson, Mos. 244.
Vide 2 Vern. 138. 247. 425.
571. 644. 645. 1 Vern. 21.
1 Ch. Ca. 98.

fant and the heir, on suggestion of insolvency in the trustees, may bring a bill for an account.

M. 1729, cor. King, C.
Clayton v. Luchin, *Mof.* 252.

28. If a lease, household and shop goods are assigned over to another, and he comes into possession, and carries on the trade, from that time they are to be considered as money received, and an account thereof taken accordingly.

H. 1730, cor. M. R.
Rodney v. Hare & al. *Mof.* 296.

29. The plaintiff in his bill having assigned 150 errors in five stated accounts, the Master of the Rolls made an order on him, to pick out those he would insist on, and if the court should be of opinion they were not errors, to consent to waive the rest; if the court thought them errors, there would be good cause either to decree an open account, or give the plaintiff leave to surcharge or falsify.

P. 1733, cor. King, C.
Dr. Dover v. Oprey,
2 *Eq. Abr.* 7. c. 18.

30. Defendant was master and part-owner of the *Carteret*. In 1733, by deed-poll, reciting the wreck of certain ships, and that the King of Spain had granted liberty to the *South-Sea* company (in whose service defendant was) to fish for such wrecks. In consideration of 700 *l.* paid by plaintiff to defendant, he assigned over 700 *l.* to be issuing out of his part of the *Carteret*, together with all profits arising from the wrecks particularly mentioned, after just allowances made. Defendant covenanted to warrant to plaintiff his share, and it was agreed that said 700 *l.* should be liable to all losses and gains on account of the intended voyage. Defendant carried several contraband goods in his ship, and plaintiff brought his bill for a general account of the voyage. *Per* Master of the Rolls, decreed a general account. Defendant appealed from this decree, and it was insisted that if the ship had been forfeited, plaintiff would not have contributed to the loss, and therefore ought not to have the gain of a clandestine freightage. But *per* Lord Chancellor—Defendant ought not to expose the ship to a forfeiture, much less to have the advantage of an unfair dealing. Decree affirmed.

M. 1735, cor. Talbot, C.
Bosjanquet v. Dabwood,
Ca. temp. Talb. 38.
2 *Eq. Abr.* 7. pl. 19. 58. pl. 10.

31. Plaintiffs being assignees under a commission of bankruptcy against *J. S.*, brought their bill against defendant, as executor of *D.*, who had lent *J. S.* several sums upon bonds at 6 *l. per cent.* interest, and had taken advantage of his necessitous circumstances, and compelled him to pay 10 *l. per cent.*, to which he submitted, and entered into agree-

ments

ments for that purpose. Decreed at the Rolls, and affirmed by Lord *Talbot*, that the defendant should account; and that for what had been really lent, legal interest should be allowed, and what had been paid above legal interest should be deducted out of the principal at the time paid. Plaintiffs to pay what should be due, and if the testator had received more than was due with legal interest, that was to be refunded by defendant, and the bonds to be delivered up.

32. A bill brought for an account against the representatives of an *East India* governor, who pleaded that plaintiff was an alien born, and an alien infidel, and could have no suit here. Plea over-ruled; for, being a mere personal demand, the plaintiff may bring a bill in this court.

33. Where an attorney's bill has been taxed at law, equity will not decree an account; for if the prothonotary does not make all just allowances, the court will refer it back to be re-considered.

34. In a bill for an account, all persons who have possessed themselves of the testator's estate ought to be made defendants.

35. Goods are assigned to plaintiff for securing a debt, the assignor afterwards becomes a bankrupt, and his assignees possess themselves of these goods. Plaintiff brought his bill against them for an account. They demur, for that this matter was relievable at law, *non allocatur*, for though plaintiff might bring trover, yet as the goods were assigned as a security, there is matter of account, and plaintiff's proper remedy is in equity.

36. If a defendant by his answer acknowledges any particular sum due, though he swears those sums were discharged, yet it is still a ground for directing an account.

37. This case being very much entangled, and the transactions of long standing, the court chose rather to dismiss the bill, and leave the plaintiff to his action at law, than direct an account before the master.

38. Colleges are not obliged to account so strictly, and so far back as common persons are.

24 Nov. 1737, cor. Hardw. C.
Ramkissen v. Barker & al.
1 Atk. 50.

H. 1738, Scacc.
Osbaldiston v. Croft & al.
Com. Rep. 612.
2 Eq. Abr. 8. c. 21.

H. 1740, Canc.
Anon. Bard. Eq. Rep. 332.
2 Atk. 121. 2 Eq. Abr. 8. pl. 24.
Note; This case in Atk. Rep.
is named *Glaifs v. Oxenham*.

P. 1740, Canc.
Ryal v. Roberts,
Barnard. Eq. Rep. 38.
2 Eq. Abr. 8, c. 23.

10 Feb. 1741, cor. Hardw. C.
Brace v. Taylor, 2 Atk. 254.

13 June 1743, cor. Hardw. C.
Sturt v. Mellish, 2 Atk. 610.
Vide Sharman v. Sharman,
2 Vern. 276.

11 Dec. 1744, cor. Hardw. C.
Attorney-General v. Balliol College,
9 Mod. 409.

S. C. A college made a lease, the rent subject to taxes; the tenant by mistake did not deduct them. Equity will not allow him those already paid, nor decree the account back.

3 Feb. 1746, cor. Hardw. C.
Bratt v. Forcer and others,
3 Atk. 403.

39. Previous to the marriage of G. S., the father of the intended wife covenants to pay 1000*l.* to the husband on the marriage, and that his heirs, executors, &c. should pay likewise to the husband, his executors, &c. six months after the father's death, 500*l.*, as the remainder of the wife's portion; and by the same deed the husband contracted he would give security by specialty, that in case his wife survived him, his heirs, executors, &c. should, within six months after his death, pay her 1000*l.* He gave a bond three days after the marriage, and then becomes a bankrupt; but before the bankruptcy, and after the father-in-law's death, the husband being indebted to the plaintiff, assigns the 500*l.* to him as a security for the debt. The bill is brought by the assignee of the 500*l.* against the executrix of the wife's father, and the bankrupt and his wife, and the assignee under the commission for this 500*l.* Lord Chancellor directed the executrix of the wife's father to account for the 500*l.* to the plaintiff, as it never was the money of the wife, but a debt due to the husband himself.

26 Feb. 1748, cor. Hardw. C.
Shib v. Foster, 1 Ves. 88.

40. The conveyance of an estate to which the defendant was entitled was suspended till an account of the rest of the estate was taken, from the danger of the plaintiff's losing his demand.

May 1749, cor. Hardw. C.
King v. Phillips, 1 Ves. 332.

41. An account was directed to be taken of testator's personal estate at making the will, and at his death, where one legacy was so near in value to the personal estate as that it would defeat the rest; otherwise if it should have occasioned only an abatement in proportion.

27 Feb. 1751, cor. Hardw. C.
2 Ves. 190.

42. After the death of husband and wife, her representatives are not to account for money received during the coverture, whether she had a separate estate or not, unless a special case made.

11 July 1752, cor. Hardw. C.
Ratrey v. Darley, 2 Ves. 424.

43. The defendant lived with a woman 13 years, as man and wife, and had several children by her; she afterwards married the plaintiff, who brought this bill to oblige the defendant to account for the rents and profits of an estate belonging to her, which he had received during the cohabitation.

Defendant

Defendant filed a cross bill for an account of the money expended by her, and setting up an agreement in writing, by which he was to leave her by his will so much, as he received of the rents and profits of her estate, deducting thereout what she stood indebted to him. *Per cur.*—The cross bill dismissed with costs, and defendant to pay costs on the original bill.

44. Bill to set aside an award; the court will not let the party go into any legal objection, except for partiality and corruption; but if the bill is for an account, and prays to set aside an award in order to let in such account, there the plaintiff may make legal objections.

45. A trustee and executor not proving the will, but receiving trust-money, may be called to account, but not as executor; and have proper allowances before the Master. The executor or administrator is the proper person to call him to account, which is a discharge as to him.

46. Account of the produce of an estate in *Antigua* belonging to an infant, and consigned to the acting executor in *England*, directed to be taken annually by affidavit.

47. Admission, that any timber has been wrongfully cut, gives a right to an account.

48. Where the account is incidental to the plaintiff's title, defendant must set it forth.

49. There may be a decree for an account, without declaring the will well proved, where one of the witnesses is abroad.

50. Where a party has laid by a great length of time, and suffered an estate to be distributed, he shall not have an account.

3 Bro. Ch. Ca. 633. Hollinghead's case, 1 P. Wms. 742. 2 Ves. 472. Johns v. Mehinneor, Smith v. Clay, cited 3 Fletcher, 1 Atk. 467. St. John v. Turner, 2 Vern. 418. King, 34. Pooley v. Ray, 1 P. Wms. 355.

51. An account directed four years after dissolution of a partnership, circumstances shewing that one partner had retired, from a conviction that the partnership was insolvent.

52. The answer need not set forth an account, where the ground upon which it is prayed is denied;

27 Nov. 1754, cor. Clarke, M.R.
Champion v. Wenham, Amb. 245.
1 Eq. Abr. 50.

28 June 1755, cor. Hardw.
Moore v. Moore, 2 Ves. 599.
2 Eq. Abr. 757. pl. 15. a case
of same name but not S. C.

17 June 1761, cor. M. R.
Brooks v. Oliver, Amb. 406.
Vide Blair v. Drake,
11 Feb. 1755.

M. 1789, cor. Thurlow, C.
Lee v. Allston, 3 Bro. Ch. Ca. 37.
1 Ves. jun. 82.

H. 1792, cor. Thurlow, C.
Hall v. Noyes, 3 Bro. Ch. Ca. 483.

H. 1793, cor. M. R. abf. C.
Fitzherbert v. Fitzherbert,
4 Bro. Ch. Ca. 231.

H. 1793, cor. M. R. abf. C.
Hercy v. Dinwoody & al.

4 Bro. Ch. Ca. 257.
Vide E. of Deloraine v. Brown,
Earl of Pomfret v. Lord Windsor,
3 Bro. Ch. Ca. 639. (n.) Hurt v.
Western v. Cartwright, Ca. temp.

T. 1793, Canc.
Anderson and others, Assignees,
v. Malby, 4 Bro. Ch. Ca. 423.

28 June 1797, cor. Loughb. C.
Marq. of Darnley v. Sewari,
3 Ves. jun. 446.

Vide Sir James Cockburn v. Sir Lawrence Dundas.

nied; as where the bill charged a dealing in pictures by commission, and the answer denied that, and stated, that the defendant sold them to the plaintiff in the course of his trade.

See more under *Debtor and Creditor, Executors and Administrators, Interest, Limitations (Statute of), Trade.*

Sec. 2. What is the Course of the Court where an Account is directed.

16 Feb. 1709, Canc.
Rider v. Bailey,
6 *Vin. Abr.* 332. pl. 32.
2 *Eq. Abr.* 237. pl. 5.

1. THE constant course of the court is, where a mutual account is decreed, to reserve costs till after the report, that the court may have it in their power to punish the wrong-doer.

8 May 1716, Dom. Proc.
Pitt v. Page, 1 *Bro. P. C.* 372.
6 *Vin.* 332. c. 36. 365. c. 11.
2 *Eq. Abr.* 237. c. 7.

2. Costs generally follow the event of an account; but where the account is intricate or doubtful, there shall be no costs.

17 Feb. 1724, Canc.
Lord Kingsland v. Lady Tyrconnel,
1 *Vin. Abr.* 186. pl. 10.
2 *Eq. Abr.* 11. pl. 13.

3. An account was directed after thirty-three years acquiescence. But why? the book is silent.

H. 1747, cor. Hardw. C.
Adams v. Bobun,
Barnard. 270, 271.
2 *Eq. Abr.* 205. pl. 3.

4. The course of the court is, that where an account must necessarily be directed at the hearing, a *commission* before the hearing shall never be granted to *examine witnesses* beyond sea, when the granting such commission will delay the directing the account; and the proper time to apply for such commission is *after the account is directed*.

6 Mar. 1740, cor. Hardw. C.
Cyles v. Wilcox and others,
2 *Atk.* 144.

5. The House of Lords very often, in matters of account which are intricate, refer it to two merchants, named by the parties, to consider the case and report their opinions upon it, rather than leave it to a jury.

30 July 1751, cor. Hardw. C.
Ex parte Bax, 2 *Ves.* 388.

6. The course of this court is analogous to proceedings at law, where an account is to be taken by auditors; but the modern practice is to refer matters of account to a Master.

P. 1779, cor. Thurlow, C.
Bentcraft v. Rich,
1 *Bro. Ch. Ca.* 56.

7. Money in the funds, belonging to wards of the court, cannot be transferred into the name of the accountant-general to the credit of the cause, until the account is taken by a Master, and his report made.

T. 1793, cor. Thurlow, C.
Attorney-General v. Parnter,
4 *Bro. Ch. Ca.* 409.

8. In an account directed against the husband's estate of dividends of the wife's separate property received

received by him, consideration was had of his *extra* expence of maintaining her in consequence of her being a lunatic.

Sec. 3. Of the Parties to an Account.

1. **I**N an account both parties are actors.

T. 1714, cor. Harcourt, C.

Dane's case, 1 P. Wms. 263.

Salk. 702.—A *ne exeat regnum* lies for one defendant against a co-defendant.

Vide Prec. in Ch. 197.

2. And may revive.

M. 1721, cor. Macclesfield, C.

Hollinghead's case, 1 P. Wms. 743. 2 *Eq. Abr.* 2. (n. to pl. 3.) 579. pl. 7.—*Vide* Anon. 3 *Atk.* 691.

Sec. 4. Who are bound by an Account stated, and where an Account once stated shall be conclusive, or where it shall be opened or unravelled.

1. **A.** Settles an equity of redemption for a jointure, and afterwards becomes a bankrupt, the assignees settle an account with the mortgagee, the jointress shall be bound by this account, unless she can shew particular errors. She, however, had leave to amend her bill.

T. 1683, cor. North, C. S.

Knighi v. Bampffield & al.

1 *Vern.* 179.

2. **P. S.** being guardian to appellant's wife *dur. minorit.* placed her with C. S. for her education, and ordered respondent to pay C. S. what sums should be called for. Several sums were paid on account, and were allowed. Appellant's wife, when she attained her age *as by order of P. S.*, desired more money, and two sums were accordingly paid her. Appellant's wife afterwards came to an account with P. S., and general releases were executed, but said two sums were not entered in the account. Respondent not having received any allowance for these two sums, preferred his bill in equity, and the appellant's wife by her answer admitted the receipt of them. Chancery decreed, that there appearing no positive orders from P. S. for payment of these two sums, appellants ought to pay the principal, interest, and costs. This decree affirmed by the lords.

12 Jan. 1697, Dom. Proc.

Dolphin & Ux. v. Haynes,

Show. P. C. 17.

1 *Eq. Abr.* 79. pl. 3.

On appeal from a decree in Chancery.

3. **A.** is tenant for life of a trust-estate, remainder to his sons. A., before a son born, brings a bill against the trustees, and an account is decreed, and afterwards taken. This account shall

M. 1705.

Leonard v. Lady Suffex,

2 *Vern.* 527.

shall bind the sons, for all persons that could be made parties were parties to the suit.

20 Dec 1709, Dom. Proc.
*Gez & Ux. v. Lewis, Admini-
strator, & al. Colles' P. C.* 416.

4. If the immediate parties to a dealing account together, the representatives of either shall not be received to object to it.

15 May 1712, Dom. Proc.
Wych v. Packington & Ux.
1 Bro. P. C. 372.
11 Vin. 172. c. 47.
21 Vin. 499. c. 18.

5. The guardian of an infant prevailed on her, about a month after she came of age, to sign and allow two several accounts of his receipts and disbursements, touching her estate; on the balance of both which accounts, there appeared to be a considerable sum due to him. But as neither of them were perused or examined by any person on behalf of the young lady, nor any vouchers produced or delivered up to her, they were both set aside, and a general account directed.

T. 1720, Canc.
Clawering's case, Proc. in Ch. 535.
2 Eq. Abr. 9. c. 7. S. C. & P.
3 P. Wms. 402. S. C. but not S. P.
tit. *Clawering and Wifley*.

6. A receiver to the guardian of an infant, who has his account allowed him by the guardian, shall not be obliged to account over again to the infant when he comes of age.

T. 1723, Canc.
*Duchess of Marlborough v. Sir
John Vanburgh & al.* 9 Mod. 23.
2 Eq. Abr. 11. pl. 12. S. C.
Vide 2 Ch. Ca. 32. 1 Vef.
163. 1 Vern. 179. 465. 2 Com.
Dig. tit. *Chancery* (2 A. 8).

7. The workmen and overseers employed to build *Blenheim-House* having accounted with the officers of the crown, and the Duke of *Marlborough* being afterwards called upon for a considerable surplus charge, thought himself not concluded by those accounts, and brought a bill for an account of what monies had been received of the crown by the overseers. Decreed they should account again before a Master.

T. 1725, cor. King, C.
Western, Executor, v. Cartwright,
Executor, Sel. Ca. in Ch. 34.
2 Eq. Abr. 10. pl. 11.

8. Stated accounts by men of perfect age and understanding, after a great length of time, not to be set aside against an executor. *Per Lord Chancellor*—To have a bill now brought against the executor would be very hard; the court has gone great lengths in relieving against the statute of limitations: people should come in a reasonable time. He did not say accounts were conclusive, but it would be very hard to put a man's executor, who knew nothing of the matter, to answer.

1731, cor. Cowper, C.
Godfrey v. Boucher,
2 Eq. Abr. 92. pl. 4.
3 Vin. Abr. 139. pl. 38.
In this case Lord Chancellor thought that the two terms given by the statute 9 & 10 W. 3. c. 15. s. 2. for complaints against undue awards, concluded all courts and all manner of equity.

9. Bill was for an account, and to impeach an award between plaintiff and defendant B., touching a partnership in buying and selling diamonds in France in 1719, and the bill was against the arbitrators as well as the parties. Defendant B. (the party), as to the account, &c. pleads the award, &c. and the arbitrators as to a discovery of several particulars,

§ 4. *Stated, where conclusive or not.*

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culars, and as to any relief against them, plead the submission, and that by consent it was made an order of this court, &c. Lord Chancellor allowed B.'s plea to the account, &c. but over-ruled the arbitrator's plea as covering too much, i. e. several particulars which might tend to shew a partiality, &c. in their proceedings.

Vide Alarides and Campbell, Bunb. 265. in Scacc. contra.

10. In a decree of foreclosure against an infant, though the infant has six months after he comes of age to shew cause, &c. yet he cannot ravel into the account, nor even redeem, but only shew an error in the decree.

H. 1734, cor. Talbot, C.
Mallack v. Galton, 3 P.Wms. 353.
In Lyne and Willis, cor. M.R.
13 May 1730, this was admitted to be the settled practice.

11. When there is a plea of a stated account to a bill brought for a general one, the plaintiff must amend; but pays only the costs of the day.

H. 1736, cor. Hardw. C.
Sumner v. Thorpe, 2 Atk. 1.

S. C. There is no rule more strictly adhered to in this court than that when the defendant sets forth a stated account he shall not be obliged to go on upon a general one, because very often a stated account would unravel a perplexed affair, which might otherwise remain in the dark if left to a general one.

12. A bill may be brought for errors in an account, though it has been settled for three or four years.

15 Jan. 1740, cor. Hardw. C.
Roberts v. Kuffin, 2 Atk. 113.

13. Accounts which in themselves appear just and fair, settled with an infant after he comes of age, and after length of time, and the death of both parties, shall not be opened.

H. 1740, Canc.
Vernon v. Vawdrey.
Barnard. Eq. Rep. 283. 305;
2 Atk. 119.
2 Eq. Abr. 12. pl. 17.

S. C. Where fraud appeared in a stated account, the whole decreed to be opened, though it was a stated account of twenty-three years standing.

14. A plea of a stated account is bad, unless it shews the account was in writing, and what the balance was.

7 Aug. 1742, cor. Hardw. C.
Burk v. Brown, 2 Atk. 399.

15. A plea of a stated account to all matters before accounted for is bad; it should aver that it is just and true to the best of the defendant's knowledge and belief.

14 Mar. 1743, cor. Hardw. C.
Anon. 3 Atk. 70.

16. Account of mortgage-money, made up between the mortgagor and the executor of the mortgagee, does not bind the specific devisee of the mortgage. *Secus* if a mortgage were devised generally to pay debts and legacies.

T. 1743, cor. Hardw. C.
Langley v. E. of Oxford,
Amb. 17. 1 Eq. Abr. 12.

23 Mar. 1745, cor. Hardw. C.
Hankey v. Simpson, 3 Atk. 303.

17. Where a bill not only impeaches an account, but charges the plaintiff, having no counterpart of the account; if the defendant pleads a stated account, he must annex it to his answer.

24 July 1749, cor. Hardw. C.
Sewell v. Bridgt, 1 Vef. 297.

18. A general account was not set aside or opened on a new discovery, for new discovery does not open such account; otherwise if it had been a minute, strict account originally.

24 Mar 1750, cor. Hardw. C.
Tickell v. Short, 2 Vef. 239.

19. If one merchant sends an account current to another merchant in a different country, upon which there appears a balance due to himself, and the other merchant keeps the account by him for two years without an objection, the rule of this court and of merchants is, that it is considered as a stated account.

30 July 1754, cor. Hardw. C.
Pit v. Cholmondeley, 2 Vef. 565.

20. The *onus probandi* lies on the party having liberty to surcharge and falsify, which differs from the general cases of an open account.

25 Mar. 1772, Dom. Proc.
Dunbar v. Lem & Us.
6 Bro. P. C. 503.

21. No settled account ought to be opened upon the mere suggestions of a bill in equity, especially when the truth of such suggestions is fully and substantially denied by the answer.

P. 1786, cor. M. R. abf. C.
Brownell v. Brownell,
2 Bro. Ch. Ca. 61.
1 Eg. Abr. 12.

22. An account settled ten years before the bill filed, though containing very gross *items*, shall not be opened; but the plaintiff permitted to surcharge and falsify.

P. 1792, in Scacc.
Prieston v. Strutton & al.
1 Anstr. 50.

23. Where a balance of accounts is taken, and a note given for it as the balance, that must be paid, although there are subsequent accounts upon which the payee may eventually be in arrear.

T. 1796, in Scacc.
Sir Watkin Lewis & al. v. Morgan & al. 3 Anstr. 769.
Vide Walmsley v. Booth,
2 Atk. 25. *Newman v. Payne*, 2 Vef. jun. 199. *Draper's Company v. Davies*, 2 Atk. 295.

24. Where an attorney uses his influence over his client to settle an unfair account between them, the court will open it at any time.

S. C. In such a suit it is sufficient if upon the whole the court see an unfair account, although the particular objection raised by the bill are not made out in evidence.

Vide Vaughan v. Lloyd, cor.
Lord Thurlow, 1781.

S. C. If in such a suit the vouchers have been delivered up, and cannot be found, the oath of the party must be admitted as to their import.

See more under *Guardian and Ward*, *Infant*, *Limitations (Statute of)*, *Plea*, *Trade*, *Time*.

Sec. 5. What shall be a good Bar to an Account.

1. **D**etinue of charters is a good plea at law in bar of an account, and so it is in equity.

H. 1688, Case.
Countess of Plymouth v. Bladen,
 2 Vern. 33. 1 Eq. Abr. 11. pl. 3.
Vide Kerlake, Administrator, v. Pannel & al. Bunb. 287.

2. Bill for an account of the rents and profits of land. *Per cur.*—When a person has been ejected at law, and the other party has been in possession above twenty years, and no account demanded or bill filed, the statute of limitations will bar an account in Chancery, as well as an action at law for the mesne profits, for *jus possessionis* is gone by the statute; and if once the statute begins to attach, incapacity will not aid it. This statute * does not extend to a trust, but in this case defendant coming in by a recovery at law, and twenty years elapsed before bill filed, the bill must be dismissed *quoad* the account of the rents and profits.

1715, cor. Harcourt, C.
Newarre v. Ruston,
 Vin. Abr. 185. pl. 7.
 2 Eq. Abr. 9. pl. 6.

3. When a bill is for a general account, and defendant sets forth a stated one, it is *prima facie* a bar to a general one, till particular errors are assigned to the stated account.

* *Vide Norton v. Turvill*,
 2 Eq. Abr. 152. pl. 24.
 2 P. Wms. 144.

S. C. It will not support a stated account to allege there has been a dividend made between the parties; for a dividend may be made subject to an account to be afterwards taken.

M. 1737, cor. Hardw. C.
Dawson v. Dawson, 1 Atk. 1.

4. Length of time is sometimes a bar in equity to an account; but not against an administrator for execution of a trust of a real estate, though stale accounts are much discouraged by the court.

30 July 1752, cor. Hardw. C.
Earl Pomfret v. Lord Windor,
 2 Ves. 483. 485.

S. C. An offer to account will take a case out of the statute of limitations.

5. Bill for an account by a merchant against his partner. Defendant pleads that the dealings, the subject of the bill, were transacted above twenty years before bill brought, plaintiff's acquiescence without suit, and also the statute of limitations (of 21 Jac. 1. c. 16.) in bar of the account. Plea allowed for forbearance of suit for twenty years is a good bar in equity, though between merchant and merchant.

H. 1726, in Scacc.
Bridges v. Mitchell,
 Gilb. Eq. Rep. 214.
 2 Eq. Abr. 11. c. 14. 578. c. 5.
Note; The distinction is, that if open accounts are continued by subsequent acts, they are not barred by such a length of time; *aliter* if deserted; for then the court will presume the balance settled.

6. *A.* and *B.* were entitled to a personal estate by the statute of distributions, and an account thereof

M. 1730, cor. King, C.
Burke v. Bridgman,
 2 Barnard. 272.
 2 Eq. Abr. 74. pl. 25.

Vide Hart v. King, in Scacc.
Bunb. 64.

thereof was stated between them; afterwards *A.* by bill demands a discovery of particular items, supposed not to be comprised in it, and yet at the same time allows the account to have been fairly taken. Defendant pleads the stated account in bar: and it was insisted for him, that either the items must be denied in particular, by falsifying them, or saying they were not allowed, or else a surcharge must be brought in; but that here neither of these ways is taken, so that the plaintiff would unravel the account without pointing out one error in it. Lord Chancellor allowed the plea, and said, *this must not be suffered.*

See more under *Limitations (Statute of), Plea.*

Sec. 6. In what Cases and in what Manner an Accountant shall be charged and discharged, and what Allowance he shall have.

M. 1681, Cane.
Arundel v. Roll, 1 Vern. 19.

M. 1684, cor. North, C. S.
Anon. 1 Vern. 283.
Vide Marshfield v. Weston,
2 Vern. 176. & wide note to next case.

T. 1687, cor. Jeffries, C.
Whickerley v. Whickerley,
1 Vern. 470. 1 Eq. Abr. 11. pl. 13.
In 1 Eq. Abr. (5 edit.) 11.
pl. 14. b. to Marshfield and Weston, it is said to be now the established practice in Chancery that a defendant shall be allowed sums under 40s. by way of discharge, upon his oath, but the plaintiff shall not be allowed any thing on his oath.

M. 1701, cor. Wright, C. S.
Darston v. Earl of Oxford and others, Executors,
1 Eq. Abr. 10. pl. 9.
11 Vin. 298. Colles' P. C. 299.
Prec. in Ch. S. C. differently stated, 183.

Vide Mellish v. Turner, where
books were lost in the earthquake at Smyrna, and defendant's books which were charged against him were allowed to be his discharge.

1. IN account, no allowance for diet where the party comes in as a guest upon invitation.

2. An accountant shall be allowed all sums under 40s. on his oath; but then he must mention in his affidavit to whom paid, and for what, and when.

3. And the whole so allowed not to exceed 100 l.

N. B. The Lord Chancellor not satisfied with this rule, and said he would consider how to rectify it.

4. Colonel R. married Lord N.'s widow, who was executrix of her husband, and kept a book of accounts relating to his estate; and after she married Colonel R. the same book was continued on. Afterwards he went as governor to *Barbadoes* with his wife, and the servant who kept the book; they all died there. It was proved in the cause, that the book was made up from vouchers, and that great part of the money was paid; and the witness believed the whole was paid. Upon exceptions to the Master's report, adjudged the book should be allowed as a discharge, as well as a charge.

8. C. Lord Keeper thought it a good rule to establish, that where a man was charged by an oath, or a book, the same should be his discharge.

5. Bill for an account of one as-bailiff, suggesting fraud; if defendant pleads that at such a time he did account, he need not go on and set out an account.

P. 1726, Dict. *per Page*, B.
in *Quilter v. Muffendine*,
Gilb. Eq. Rep. 229.
2 Eq. Abr. 73. c. 23.

6. The court allowed the executrix of a master of a ship sums under 40s., which the testator had fairly entered in an account-book, without proof, for the same would have been allowed to the testator on his own oath.

M. 1729, cor. King, C.
Morely v. Bonge, Mos. 253.
Vide 1 Vern. 283. 470.
2 Vern. 176.

7. When at law a person in an account is allowed sums under 40s. on his oath, he must swear positively, and not as to his belief only: the same directions as to this matter are given under a decree in this court, that he must peremptorily swear to the fact.

16 Oct. 1742, cor. Hardw. C.
Robinson, Bart. v. Cumming,
2 Atk. 410.

8. Allowance made to a solicitor, employed by the mother of an infant, in receiving rents which were in danger of being lost, given as a just allowance to the mother, supposing her the accounting party.

T. 1789, cor. Thurlow, C.
Stewart v. Hoare,
2 Bro. Cb. Ca. 663.

9. Son employed under, paid by, and accounting to his father, may be a witness, but is not accountable to his father's principal.

4 May 1791, cor. Thurlow, C.
Cartwright v. Hateley,
1 Ves. jun. 292.

Sec. 7. Account of Profits, from what Time; where from the Title accruing, and where from the filing of the Bill only.

1. IF an estate is devised in trust, to pay debts, the heir must account for the rents and profits, from the time of filing the bill. *Vide* Montagu and Ford, 2 Ch. Ca. 225. 1 Vern. 282.

H. 1729, cor. M. R.
Chambers & al. v. Harcourt & al.
Mos. 124.

2. Where one is in possession of lands belonging to an infant, if the infant when of age makes out his title, he shall recover the profits in equity from the first accruing of his title, and not from the filing of his bill only.

M. 1731, cor. King, C.
Bennet v. Whitehead,
3 P. Wms. 645.
2 Eq. Abr. 7. pl. 17. 588. pl. 2.

S. C. So the defendant shall account for the profits from the time the plaintiff's title accrued, and not from the filing the bill only, if the defendant

Vide *Dormer v. Fortescue*,
3 Atk. 124.
Lord Townsend v. Ash,
3 Atk. 34.

ant had concealed the deeds and writings making out the plaintiff's title.

M. 1793, cor. Loughb. C.
Hervey v. Ballard,
4 Bro. Ch. Ca. 468.

3. An account of rents of an estate held of trustees, ordered only for the last six years before the bill filed, the statute of limitations being insisted on.

H. 1794, cor. Loughb. C.
Forder v. Wade & al.
4 Bro. Ch. Ca. 521.

4. In a doubtful case, the account of rents and profits directed only from the time of the bill being filed.

Sec. 8. Of mutual Debts and Accounts Current between Merchants and Traders; how the same shall be taken, or where allowed in Equity.

M. 1692, cor. Lord Commissioner Hutchins,
Sherman v. Sherman, 2 Vern. 276.
3 Eq. Abr. 12. pl. 10. 13. pl. 11.
375. pl. 2.

1. **T**HOUGH length of time is no bar, where accounts have depended a great while between two merchants, yet if dealings between them have ceased for several years, and one of them dies, and the survivor brings a bill for an account, the court will not decree an account, but leave the plaintiff to his remedy at law.

Vide Tickell v. Short,
2 Vef. 239.

If an account current is sent by one merchant to another, who receives it, and makes no objections for two or three posts, it is looked upon among merchants to be an allowance of the account.

T. 1693, Cane.
Lady Stowell v. Cole, 2 Vern. 297.

2. Where there is a decree for a mutual account, the plaintiff on his own bill may be decreed to pay the balance of the account.

28 Feb. 1698, Dom. Proc.
Warr v. Frad, Colles' P. C. 57.

3. *A.* sends *B.* as a factor abroad to buy merchandise, and commissions him to draw on a foreign merchant for the amount, which he does in the account furnished. *A.* gives credit for the amount of the bills drawn as cash; but the bills are not accepted by the contrivance of *A.* *B.* shall not be concluded by that account, but shall be paid notwithstanding.

S. C. *A.* indebted to *B.* 600*l.* finds him in great distress, and gives him 50*l.* as a loan, and takes his promissory note as for money borrowed. This note not evidence that *B.* was not indebted in the larger sum.

M. 1701, Cane;
Beaumont v. Grover,
3 Eq. Abr. 8. pl. 7.

4. Two persons had mutual dealings, but before their accounts were settled one died, and the survivor

vivor brought a bill against his executors for an account, and that plaintiff might discount what he was to pay out of what the executors were to pay him. Decreed accordingly, although it was objected it might make a *devastavit* in the executor.

5. *A.* is a goldsmith, and there is a mutual credit between *A.* and *B.*, and *A.* becomes a bankrupt, only the balance shall be liable to the bankruptcy; and it is not material whether the mutual credit be by open account or mutual stated debts.

general construction of cases respecting mutual credits, vide *Ex parte Deeze*, 1 Atk. 228. *Ex parte Prescott*, 1 Atk. 230. *Ex parte Ockenden*, 1 Atk. 235. *French v. Feun*, Cooke's Bankr. Laws, 577. *Grove v. Dubois*, 1 Term Rep. 112. *Rize v. Dickson*, 1 Term Rep. 283. *Hankey v. Smith*, 3 Term Rep. 507. *Whitehead v. Vaughan*, Cooke's Bankr. Laws, 587. *Smith and Hodson*, 4 Term Rep. 211.

6. There being accounts current between *A.* and *B.* a goldsmith, *B.* gives out his cash-note to *C.* for 5000*l.*, and *A.* mortgages his estate as a collateral security for the money. *B.* gives *C.* 100*l.* for his favour in the matter, who keeps the cash-note by him. Some time after the mortgage forfeited, *B.* becomes a bankrupt. *A.* prays relief, because *C.* neglected to turn the cash-note into money when he might have done it. It was directed that an account be taken how matters stood between *A.* and *B.*

T. 1716, cor. Cowper, C. *Lord Lansborough & al. v.*

Jones, 1 P. Wms. 325.

Note; This subject has received further regulation by stat.

5 Geo. 2. c. 30. *Vide Ryal v. Rowles*, 1 Vef. 375. As to the

general construction of cases respecting mutual credits, vide *Ex parte Deeze*, 1 Atk. 228. *Ex parte Prescott*, 1 Atk. 230. *Ex parte Ockenden*, 1 Atk. 235. *French v. Feun*, Cooke's Bankr. Laws, 577. *Grove v. Dubois*, 1 Term Rep. 112. *Rize v. Dickson*, 1 Term Rep. 283. *Hankey v. Smith*, 3 Term Rep. 507. *Whitehead v. Vaughan*, Cooke's Bankr. Laws, 587. *Smith and Hodson*, 4 Term Rep. 211.

10 Feb. 1717, Cane. *Mason v. Lake*,

2 Eq. Abr. 481. pl. 14. cited as a MS. report, said to be Lord Harcourt's.

13 Vin. Abr. 524. pl. 4. 1 Bro. P. C. 579.

10 Feb. 1717, Cane. *Mason v. Lake*,

2 Eq. Abr. 481. pl. 14. cited as a MS. report, said to be Lord Harcourt's.

13 Vin. Abr. 524. pl. 4. 1 Bro. P. C. 579.

7. *A.* a clothier and *B.* a dyer had mutual dealing in the way of their trade, which were carried on for several years without payment of money on either side. *B.* dies intestate and indebted to others by specialties, who, as principal creditors, take out administration to him, and sue *A.* at law. Equity will enjoin the action and order an account, and that *A.* shall be allowed by way of discount what was due to him from *B.*, and his costs.

H. 1727, cor. Macclesfield, C.

Downham & al. v. Matthews & al. Prec. in Ch. 580.

2 Eq. Abr. 9. pl. 8.

Vide 1 P. Wms. 325. 2 P.

Wms. 128. 130. 1 Atk. 228.

S. P. 236. S. C. cited. 8 Vin.

Abr. 460 pl. 26. Bla. Rep. 653.

Vide 1 Vern. 122. 2 Vern.

428. 2 P. Wms. 130. where

stoppage will be allowed as good

payment. Vide also 7 Geo. 1.

c. 31. 5 Geo. 2. c. 30. respect-

ing mutual credits in cases of bankruptcy,

8. Plaintiffs and intestate had mutual dealings as tradesmen. Plaintiffs were indebted to intestate 30*l.* for paper, and intestate to plaintiffs 100*l.* for fugars. Intestate died, leaving no assets to pay. Defendant takes administration as principal creditor, and then brings an action against the plaintiffs for goods sold by the intestate, and gets a verdict and judgment. Plaintiffs bring their bill, suggesting a *mutuatus*, and praying an account; and that, deducting the debt due by them to the intestate, they may have satisfaction out of the assets. *Per cur.*—Decreed, that defendant acknowledge satisfaction on the judgment, and that

M. 1724, cor. Macclesfield, C.

Hawkins & al. v. Freeman,

8 Vin. Abr. 560, 561.

2 Eq. Abr. 10. pl. 10.

Vide *Downham v. Matthews*,

Prec. in Ch. 580. cited for plain-

tiff.

Note; In all mutual dealings

between traders it is reasonable to

suppose they intend one debt

should be set against the other,

and the balance only to be paid

as in cases of bankruptcy, and

therefore the least evidence of

such an intent is sufficient.

Dict. per Lord Chancellor in S. C.

an account be taken between the parties, and the balance due to plaintiffs be paid in a due course of administration, but *without costs*, because defendant is an administrator.

26 Feb. 1741, cor. Hardw. C.
Wilks v. Jernegan, 2 *Atk.* 252.

9. Where persons have mutual dealings, signing the account is not necessary to make it a stated one; but it is keeping it any length of time without making an objection which binds the person to whom it is sent, and prevents his entering into an open account afterwards.

S. C. The delivering up vouchers is an affirmation that the account between the parties is a stated one; but it is not absolutely necessary they should be delivered up at the time the account is settled.

Bankers keep the drafts which are made upon them on files, because they are vouchers, and of use in clearing up disputes between their shop, and a third person.

See more under *Bankrupt, Trade*.

Sec. 1. Of the Extent of a Power of Appointment; what shall be deemed a good Execution of such a Power, and where the same may be unequally exercised.

T. 1684, cor. North, C. S.
Blisset v. Sawyer, 1 *Vern.* 244.

1. THE husband settles lands to the use of himself for life, remainder to his wife for life; and farther agrees that she should hold and enjoy the same until his heir or executor should pay to her, or to her executors, administrators, or assigns, 100*l.*: she dies in the lifetime of her husband, and by a writing in nature of a will devises the 100*l.*, and held a good appointment in equity.

M. 1700, Canc.
Barnett v. Helgrave,
1 *Eq. Abr.* 296. pl. 2.

2. A. devised an estate to his wife for life, and after to plaintiff his niece, and her heirs, upon condition that she pay 400*l.* to such person as his wife by her will in writing, or any other writing, should direct and appoint, and dies. The wife after marries a second husband, and then makes a will

will in writing, and thereby, reciting the power given her by her former husband's will, appoints the 400*l.* to be paid to her husband, his executors or administrators; and that when he shall have fully received the 400*l.*, he shall pay 100*l.* to *B.*, 50*l.* to *C.*, and 50*l.* to *D.*, and made her husband her executor; and then goes on and says, that she has published this her last will in the presence of three witnesses, and the husband subscribed that he approved of the will. The husband died first, and made his wife executrix and residuary legatee; then *B.* and *C.* die both intestate, and afterwards the wife dies. Defendants take out administration to her with the will annexed, and also to *B.* and *C.* *Per cur.*—If this was a thing purely testamentary it would be a lapsed legacy, but here the 400*l.* was not in its nature testamentary, for they take as nominees, and it is but the execution of a trust. Decreed the money to be paid.

3. Sir *C. M.* married the daughter of *E.* After some years cohabitation Lady *M.* eloped, and lived in a scandalous manner. *E.*, by his will in 1696, devised (*int. alia*) 6000*l.* to trustees in trust to pay the principal and interest as Lady *M.* should by deed or will appoint, free from the debts of Sir *C. M.*, or any after-taken husband. On 10th August 1716, Sir *C. M.* met with Lady *M.* and took possession of her; and next day articles were executed between them, attested by four witnesses, that, in consideration Sir *C. M.* would permit his lady to live separate from him, she would settle 200*l.* *per ann.* on him for life, and pay him 1000*l.* out of her separate estate by quarterly payments. On 10th November the first quarter became due, and they met at the Temple-hall; and on 24th November the agreement was ratified by indorsement, and subscribed by four witnesses as before. On 10th November Lady *M.* made her will, and devised several specific legacies to *F.*, whom she made executor and residuary legatee. There having been a bill by Lady *M.* against Sir *C. M.* to set aside the articles, or that he should elect to take 200*l.* according to the articles, and a cross bill by Sir *C. M.* to carry the articles into execution, the cause was referred by the Chancellor of the Exchequer to the judges, and pending the reference Lady *M.* died. The proceedings were revived against *F.* her executor; and now *per cur.*—The articles were deemed a good execution under the will of *E.*, and Sir *C. M.* could not be excluded

H. 1726, in Scacc.

Sir C. Moore v. Freeman & al.

Bunb. 205.

2 Eq. Abr. 26. pl. 29.

Vide Mitchell v. Mitchell.

Bunb. 207. where there was a gift by the husband to the wife without the intervention of trustees, and held good in equity.

* *Note*; Upon the trial of this issue, which lasted nine hours, verdict, that the articles were fairly obtained without duress.

Upon the equity reserved there was a decree for Sir C. M. which was affirmed by the Lords with 40*l.* costs. Bunb. Rep. 207.

26 April 1735, cor. Talbot, C.

Menney v. Walker,

Ca. temp. Talb. 72.

Vide Lister v. Robinson, Thomas v. Thomas, 2 Vern. 513. Austen v. Austen, Mildmay's case, 1 Co. 175. 177.

excluded by the negative words, and Lady M. was bound, though her trustees were not parties, the articles being an appointment pursuant to a power; but a point arising whether the articles were not obtained by duress * an issue was directed, upon which it was found that the articles were fairly obtained.

4. A father by marriage settlement has a power to make an appointment of a sum, not exceeding a sum certain, for portions and maintenance of younger children, in such manner and under such limitations as he shall appoint. He has several younger children, and by his will (taking notice that the rest were provided for by their grandfather) he appoints the whole sum to one. Decreed, first at the Rolls, and afterwards by Lord Chancellor, that this was not a good appointment and execution of his power.

T. 1744, cor. Hardw.

Parsons v. Parsons, 9 Mod. 464.

5. A. a freeman of London, upon his marriage with B., entered into certain articles, whereby 11,000*l.*, his wife's fortune, was to be lent to the husband on the security of his bond, and when called in by the trustees, was agreed to be laid out in lands, upon trust that the husband should take the rents and profits thereof for life, and after his decease, that the principal money or lands purchased should be paid or conveyed to the use and for the portions of the daughters and younger sons of the marriage, in such manner as the husband and wife or the survivor of them should direct, limit, or appoint. Proviso, that if the husband should in his lifetime give to any daughter or younger son any portion, or should leave to her or him any money or land, then the portion of money or land so given or left, should be taken as part of the portion thereby to be provided, unless he should declare the contrary in writing, or by his last will. The husband by will in 1725, having then one son and one daughter, directed his wife to pay his daughter 11,000*l.* at such time and in such manner as he by the marriage settlement was obliged to pay the same, and made his son residuary legatee, and his wife sole executrix.

In 1740 he had two daughters, and then by codicil, reciting his will, he directed his wife to pay the said 11,000*l.* for the use of both his daughters, in such manner as by the marriage settlement he was obliged to pay the same. And by the codicil he gave to his said two daughters 9000*l.*, to be equally

equally divided between them, at twenty-one or marriage, in case they should marry with the previous written consent of his wife; but if either should marry without such consent, her share of the 9000 *l.* should sink into his personal estate for the benefit of his son. The sum of 11,000 *l.* was never called in by the trustees, but remained on the husband's bond. He then died, leaving his said son and two daughters, the eldest of whom married without her mother's consent; whereupon the widow appointed the said sum of 11,000 *l.* as follows, *viz.* 500 *l.* to her eldest daughter, and 10,500 *l.* to the youngest. The widow now brought her bill for an account of the distribution of her husband's estate, and among the several points arising upon the settlement, will, and codicil, the following were determined:

First, as to the portion of the eldest daughter given by the codicil: *per curiam*—It seems very clear, that the portions being given only in case the daughters marry with consent; and if they marry without consent, to sink into the residuum for the son's benefit, are the same as a devise to a particular person. As to the 11,000 *l.*, there is no doubt of the widow's power of appointment; but the whole interest must be allowed for the maintenance of the daughters until the appointment was made.

Secondly, how the distribution is to be made under the custom? but more particularly if either daughter shall elect to take by the custom, whether such daughter shall be obliged to bring into hotchpot what she shall receive of the 11,000 *l.*? For though the child of a freeman shall be obliged to bring into hotchpot whatever may be received as an advancement, yet every sum a child takes from a father is not within that rule. Of this provision of 11,000 *l.* the trust is declared, and it is subject to a power of appointment; and was merely contingent on the death of the husband: now, that which is to be distributed at the death of a freeman, must be taken as things stand at the time of his decease, and the rights are then to be fixed. This therefore could only be a contingency until the power of appointment was executed.

Another consideration had great weight with the court, namely, that the sum of 11,000 *l.* was not part of the freeman's estate, but the marriage portion of his wife lent to the husband on his bond, and which the trustees might have called in if they had thought fit; had they so done, it never could

Vide Hervey v. Aston, Com. Rep. 726. 2 Eq. Abr. 147. 216. 432. 503. Ca. temp. Talb. 212. 1 Atk. 361.

Vide Newland v. Shepherd, 2 P. Wms. 194. 1 Eq. Abr. 251. Feast v. Feast, 1 Eq. Abr. 250. 253. Edwards v. Freeman, 2 P. Wms. 435.

could have been deemed part of the freeman's personal estate, and consequently could not have been brought into hotchpot.

Thirdly, if either daughter should elect to take by the custom, whether her orphanage share shall go in satisfaction of the 11,000 *l.* or *pro tanto*? The orphanage share of the children is liable to other contingencies, than their share of the 11,000 *l.* The orphanage share of such as die under twenty-one goes to the survivor: but here, the 11,000 *l.* might have been limited upon quite different contingencies: it signifies nothing to say the contingencies have not happened; it is sufficient that they might have happened: and the court clearly thought that the orphanage share of such daughter as should elect to take by the custom, should not go in satisfaction of any part of the said sum of 11,000 *l.*

Vide Blandy v. Widmore,
2 Vern. 709. Saville v. Saville,
1 Ch. Rep. 79.

27 Nov. 1747, cor. Hardw. C.
Maddison v. Andrew,
1 Vesf. 59, 60.

6. Power of appointment personally intended to proper objects; it cannot be given to their children or representatives.

S. C. Power of appointment by a mother may be unequally distributed, but not so as to be illusory, unless there is a great misbehaviour.

26 Nov. 1748, cor. Hardw. C.
Burnet v. Man, 1 Vesf. 157.
Vide Lady Roscommon v.
Fouke, in Dom. Proc.

7. Appointment by a will, by a feme covert, pursuant to a power, must be executed strictly according to the requisites in the power.

9 Dec. 1748, cor. Hardw. C.
Cunningham v. Moody,
1 Vesf. 174.

8. The power of appointment does not put the inheritance in abeyance.

24 Feb. 1749, cor. Hardw. C.
Coleman v. Seymour, 1 Vesf. 211.

9. A mother having power of appointment cannot give an illusory share to one.

M. 1764, cor. Northington, C.
Wright v. Englefield and another,
Amb. 468. 1 Eq. Abr. 61.
Vide next case, which seems to
be S. C. affirmed in Dom. Proc.

10. By marriage articles a power was reserved to the wife of disposing of her estate real and personal, by deed or will. She being entitled to the trust of an estate during coverture, devised the same by virtue of such power. *Per curiam*—The articles were a good reservation of the estate, and the will is a good appointment.

Vide Bramhall v. Hall,
Amb. 467.

There are many instances where the court had refused to assist the defect of an intended legal conveyance against the heir, if there was not a meritorious consideration; but here the provision is for children, therefore meritorious.

3 Dec. 1766, Dom. Proc.
*Wright v. Lord Cadogan and
others*, 6 Bro. P. C. 156.
This seems to be S. C. as the
foregoing.

11. A woman entitled to the trust of a reversion in fee of lands, reserves to herself, by articles previous to her marriage, a power of disposing of all her

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her estate, to such uses as she shall think proper. She afterwards makes an appointment in favour of her husband and children. This appointment was held good, although no conveyance of the reversion was ever executed,

S. C. An appointment is made to all and every the daughter and daughters of R., and the heirs of their body and bodies, and in default of such issue to A. There were only two daughters, and one of them died under twenty-one, and without issue. Held, that the surviving daughter was entitled, though there were no cross remainders between them.

12. A feme covert, entitled to the interest of money for her life, with power of appointment as to the principal, receives a part of the principal for her support, and appoints to her husband, and dies, he cannot claim that part of the principal from the trustees received by her for her support.

M. 1794, in Scacc.
Randall v. Hearle, 2 *Astr.* 365.

13. By settlement on marriage 10,000*l.* is provided for one daughter or younger son; and if more than one, the 15,000*l.* to be raised. There being but one daughter, the father by will, under a power reserved to him, appoints his real estate to be first subject to the payment of the 15,000*l.*, and directs the application of the interest of the 15,000*l.* provided for her by the settlement, and gives her the further sum of 5000*l.* She was held entitled to 20,000*l.*; but the 5000*l.* was not deemed a vested interest till she came of age, or married.

26 Feb. 1793, cor. Loughb. C.
Phipps v. Lord Mulgrave,
3 *Ves. jun.* 613.
Vide Milner v. Milner,
1 *Ves.* 106. *Amb.* 476.

Per Lord Chancellor—I must take care to make no declaration that it is a vested interest.
Vide Mr. Cox's note to D. of Chandos v. Talbot, 2 P. Wms. 612. *Pearce and Loman*, 3 *Ves. jun.* 135.

See more under *London, Customs of, Portions, Power.*

Sec. 2. Where an Appointment under a Power is defective or become void; and where, in Default of Appointment, Equity will interfere in the Disposal of the Property.

1. ON a marriage of B's daughter with A., a freeman of London, B. the father settled a term for years in trust, that A. the husband should receive the rents until D. and E., or the survivor, should otherwise appoint, and then to whom they should appoint, and for want of appointment as A. by will should appoint; and for want of such appointment,

H. 1702, cor. Wright, C. S.
Grice v. Gooding,
1 *Eq. Abr.* 151. pl. 4.

pointment, then in trust for the executors and administrators of *A.* Trustees made no appointment. *Per curiam*—This cannot be looked upon as part of *A.*'s personal estate, for it was never in him, and therefore not subject to the custom.

M. 1721, Cane.

Anon. 1 Com. Rep. 344.

Vide Prec. in Ch. 162. 542.

2 Vern. 645. Forreft. 79. 3 P. Wms. 22. 5 edit. where the judicious editor has collected all the authorities upon this subject.

2. Upon a settlement of lands to be sold in trust for several purposes; the residue is given to *B.* and his heirs, reserving only 200*l.* to be paid to such person as the donor should by writing under his hand direct, who died without any such direction, the 200*l.* will go to the heir of the donor, and not to *B.* or his assigns.

M. 1724, cor. Macclesfield, C.

Wagstaff v. Wagstaff,

2 P. Wms. 258.

2 Eq. Abr. 763. pl. 12.

Vide Attorney-General v.

Barnes, 2 Vern. 598. D. of

Marlborough v. Lord Godolphin,

2 Vef. 76. Jones v. Clough, 2 Vef. 366.

Duff v. Dalzell, 1 Bro. Ch. Rep. 147.

Hatcher v. Curtis, 2 Eq. Abr. 671. Oke v. Heath, 1 Vef. 135.

Lawrence v. Wallis, 2 Bro. Ch. Rep. 319.

An instrument in its nature testamentary made in execution of such a power has all the incidents to a will. 1 Bro. Ch. Ca. 147.

3. A trust of lands is limited to *A.*, his heirs and assigns, or to such as he or they shall appoint. *A.* devises these lands by a will, attested but by two witnesses. The will is void, and shall not operate as an appointment.

27 Nov. 1747, cor. Hardw. C.

Maddison v. Andrew,

1 Vef. 59, 60.

4. Discretionary power of a parent to appoint not being executed, does not devolve on the court.

4 Nov. 1748, cor. Hardw. C.

Oke v. Heath, 1 Vef. 135. 139.

5. A wife having by marriage articles power by deed or will to appoint 4000*l.* to her kin, and in default of appointment to go according to the statute. The wife appoints by will to *G.*, he paying an annuity in consideration of it. *G.* dies in her lifetime. The appointment is void, and it shall fall into the residue, but the annuity shall be a charge thereon.

Vide Burnet and Helgrave,

1 Eq. Abr. 296. pl. 2.

8. C. An appointment by will under a power becomes void by the death of the appointee in the lifetime of the testatrix.

12 July 1749, cor. Hardw. C.

Burlingh v. Pearson, 1 Vef. 281.

6. A power of appointment by a father having been made unequally, is not well executed.

28 Jan. 1762, Dom. Proc.

E. of Bute v. Stuart & al.

5 Bro. P. C. 534.

7. *A.* by will devised his collieries, &c. to trustees, upon trust to convey and dispose of the same in such manner as his daughter *M.*, whether sole or covert, should direct or appoint, and for want of such direction and appointment to apply the money arising thereby to certain purposes in his will mentioned. He then declared, "that though his meaning was to give his said daughter the absolute disposal of the said collieries, &c."

"to

"to prevent the expence and trouble that must attend the management of affairs of such a nature under the direction of the court of Chancery, he requested his said daughter to direct the money arising therefrom to be applied in such manner as he had directed the same in default of her direction and appointment." The daughter made an appointment in favour of her husband absolutely. But this appointment was held to be void, as being contrary to the testator's intention.

8. Legacy to *A.* for life, then to such children as she should appoint. In default of appointment it shall go equally.

T. 1790, cor. Tharlow, C.
Witts v. Boddington,
3 Bro. Ch. Ca. 95.

9. Settlement of the wife's estate to such uses as the husband and wife, or the survivor, should appoint by deed or will with three witnesses; in default thereof to the heirs of the husband. The wife surviving made a disposition by her will to a charity, and therefore void. Decreed to the heir of the husband.

14 Mar. 1797, cor. M.R. abf. C.
Attorney-General v. Ward,
3 Vef. jun. 327.

See more under *London Customs, Portions, Power.*

GENERAL REFERENCES.

Abbotson—*Ecclesiastical Persons and Things.*

Allowance for Maintenance—*Guardian and Ward, Parent and Child, Portions, Legacy, Lunatic.*

———— to **Trustees**—*Executors and Administrators, Guardian and Ward, Lunatic, Trust and Trustees.*

———— to an **Accountant or Receiver**—*Account.*

———— to **Mortgagees**—*Mortgage.*

———— of a **Bankrupt** under 5 G. 2.
Bankrupt.

Apportionment—*Average, Proportion.*

Attorney—*Officers of the Court of Equity, under tit. Equity; Solicitor and Client.*

Attornment—*Landlord and Tenant.*

A—u

Annuity.

Sec. 1. What shall be construed a good Annuity, and whose Persons and Estates are liable to pay the same.

20 Feb. 1698, Dom. Proc.
Griffith v. Anvill & Un.
Colles' P. C. 52.

1. **A**N annuity provided by marriage articles to be paid to the wife, if she survived, out of the husband's real estate; if that fund fail, decreed a charge upon his personal property.

P. 1705, cor. Cowper, C. S.
Oldham v. Litchford,
2 Freem. 284.
2 Eq. Abr. 44. pl. 8.
2 Vern. 506. and 1 Eq. Abr. 231.
pl. 4. S. C. differently stated.
Vide Dutton and Poole,
1 Ventr. 318. where testator was making his will, and intending to raise portions by selling timber, his eldest son desired him not to cut down the timber, for that he would answer the value to the younger children, but refusing to make good his promise, plaintiff, the husband of one of the daughters, brought his action upon the promise, and recovered.

2. The testator was making his will, and (*inter al.*) was directing an annuity of 40*l.* *per ann.* to be paid to plaintiff by defendant, the testator's brother. The defendant being present desired the testator not to put it in his will, but said, as he was a Christian, he would take care to see it paid, and thereupon it was omitted. *Per* Master of the Rolls decreed the payment of this annuity, and that it should be charged upon the *real estate*. Upon an appeal, Lord Keeper affirmed the decree as to the payment of the annuity, but said he could not decree it a charge upon the land; but the Master of the Rolls being in court said, the reason he went upon to charge the land was, because the maintenance of a poor scholar was a charity, and within the statute of 43 *Eliz.*, and it might amount to an appointment within that statute.

S. C. as reported in 2 Vern. 506.
Vide Pember v. Mathers,
1 Bro. Ch. Ca. 54.

A. devises land to his brother, and makes him executor, and wills, that out of his personal estate, and half a year's rent of his real estate, he should pay his legacies, and gives an annuity to his nephew; it being proved the brother promised the testator to pay the annuity, or otherwise he would have charged his real estate therewith. Decreed at the Rolls the real estate to be charged with the annuity, and affirmed by Lord Keeper on appeal.

3 P. Wms. 128. n.
Atwood v. Lamprey,
cor. Jekyll, M. R. M. 1719.
Vide Wildey v. Coopers' Com-
pany, cor. Harcourt, M. 1713.

3. One in satisfaction of a widow's dower mortgaged lands on condition to pay her 20*l.* *per ann.* This being an annual payment secured by land, was held liable to answer taxes as the land paid; but the court refused to make the annuitant refund in respect of the payments she had received tax free, and for which the party paying had omitted to deduct.

4. An

4. An appointment of an annuity to be paid out of an office, if voluntary, is countermandable.

M. 1707, cor. Cowper, C.
Young v. Cottle, 1 P. Wms. 101.

5. One devises that his executors shall sell his lands, and invest the money in purchasing an annuity for J. S.; the testator dies, and the annuitant dies three months after the testator, yet the administrator of the annuitant shall compel a sale *, and shall have the money arising therefrom, and also the rents and profits till sale, *for it was the intention of the will* to give away all from the heir, and turn the land into personalty.

M. 1725, cor. King, C.
Yates v. Compton, 2 P. Wms. 309.
Sel. Ca. in Ch. 54.
2 Eq. Abr. 63. pl. 6.
Vide Cruse v. Barley,
3 P. Wms. 20.
* "And the heir to join in
"the sale," Reg. Lib. 1725. B.
fo. 242.

not mentioned in what right the court took the plaintiff to be entitled.

6. Annuity granted out of lands lying in *Mid-
dlesex*. A. hath notice of this grant, and afterwards purchases the inheritance of the lands. The grantee shall have his annuity against A., though his grant was not registered because A. had notice.

M. 1726, in Scacc.
Cheval v. Nichols, 1 Stra. 664.
2 Eq. Abr. 63. c. 7.
Vide Lord Forbes v. Deniston,
2 Bro. P. C. 425. 13 Vin. Abr.
tit. Fraud (L. 2), 550. c. 9.
Blades v. Blades, 1 Eq. Abr. 358.
Le Neve v. Le Neve, 1 Vef. 614.

Amb. 436. S. C. *Sheldon v. Cox & al.* Amb. 624. If the common agent of the vendor and vendee have notice, it is sufficient.

7. A bond given to a kept mistress for the payment of an annuity of 80 l. for the maintenance of herself, and provision for a child she had by the obligor, shall not be set aside in favour of his legitimate children or heir, if not obtained by fraud. But the annuity was decreed *per* Master of the Rolls to be paid even after simple contracts, this being a voluntary bond; and that in that course of payment a fund should be set apart out of the personal estate; but his honour having given no direction whether the real estate should be chargeable in case of a defect of the personal assets, on appeal Lord Chancellor Talbot held the real estate liable in case of a deficiency in the personal estate, and decreed, *that if the same should fall short*, upon payment of the arrears and growing payments by plaintiff (the heir), and that upon his securing the annuity out of a sufficient part (of the real estate) when of age, the obligee be restrained from proceeding upon the bond at law.

11 Dec. 1735, cor. Talbot, C.
Cray v. Rooks,
Ca. temp. Talb. 153.
2 Eq. Abr. 182. pl. 7.
Vide Jones v. Powell, 1 Eq.
Abr. 84. pl. 2. *Fairbeard v.*
Bowers, 2 Vern. 202. Prec. in
Ch. 17.

8. An annuity not set aside for being bought somewhat too cheap, there being no imposition.

H. 1743, cor. Hardw. C.
Floy v. Skerard, Bart.
Amb. 18.

9. The late D. of W. granted two annuities to Dr. Y., chargeable on his lands. The first, in 1719, was in consideration of the great progress and advances which the doctor had made in polite learning; and the second, in 1721, (after vesting his estates in trustees by sale, &c. to pay

M. 1744, cor. Hardw. C.
Bedford v. Gibson, 9 Mod. 4. 2.
2 Atk. 152. S. C. *nomine Stiles*
v. Attorney-General; but the
reporters differ in the period of
adjudication.

The case of *Jones v. Powell*, 1 Eq. Abr. 84. 143. was cited, but Lord H. thought it not applicable.

all his debts,) was in consideration that the doctor, at the request of the duke, had quitted the service of Lord E., and had thereby lost an annuity of 100*l*. The latter annuity recited the former grant, and each had a power of distress. In 1725, the duke made a second general deed of trust of the surplus in the hands of the first trustees, in order to pay all his just debts. The question was, whether these annuities, or either of them, should prevail against *bonâ fide* bond or simple contract creditors. *Per cur.*—The two grants fall under different considerations. The first is for a very honourable consideration, but not such a one as the statute of *Elizabeth* ever intended; *aliter* if the doctor had been the duke's tutor. As to the second, there appears a sufficient consideration to support it against creditors under the statute of *Elizabeth*. So far as the annuities are voluntary, they are good against the grantor himself, though otherwise perhaps upon the administration of legal assets in the hands of an executor or administrator; for there a voluntary bond shall be postponed to simple contract creditors for a valuable consideration: these annuities are charges on a fee-simple estate. Decreed, therefore, that the first annuity shall not prevail against either bond or simple contract creditors for valuable consideration; but the latter shall take place of both, and that the former shall be paid out of the surplus, if any, in the hands of the duke's representatives.

29 July 1747, cor. Hardw. C.
Coverley v. Dudley and another,
3 Atk. 541.

10. Lady C. H. gave the residue of her estate in trust to pay the produce thereof to Lady Dudley for life for her separate use, and after her death to her children, and appointed B. executor. Lady Dudley wanting money took up 120*l*. of B., and granted him an annuity of 20*l*. during his life, and directed B. to pay himself out of the produce of C. H.'s estate by quarterly payments. Lord Hardwicke said, *Lady Dudley might contract to raise money by loan, but not by annuity, as it is too large an anticipation, and therefore she was allowed to redeem the annuity from the beginning, though made irredeemable; and the payments already made were directed to be applied in discharge of the interest in the first place, and afterwards in sinking the principal, and the residue to be paid out of the produce of the testatrix's estate.*

4 Nov. 1748, cor. Hardw. C.
Oske v. Hicath, 1 Vef. 141.

11. A legacy given in consideration of paying an annuity. Legatee dies in lifetime of testator.

The

§ 1. *Where good, and who are bound.*

A—u 163

The legacy shall fall into the *residuum*, but the annuity shall be a subsisting charge thereon.

12. An annuity in fee, granted by King Car. II. out of the *Barbadoes* duties, is not a rent, nor realty, nor within the statute of frauds, nor statute *de donis*; but being settled on *A.*, and the heirs of her body, is a fee-simple conditional at common law, the remainder over void in case of a common person, and *A.* having had issue may bar possibility of reverter.

23 Feb 1750, cor. Hardw. C.
Earl Stafford v. Buckley,
2 *Ves.* 170. 178, 179.
Vide Forth v. Chapman, 1 P.
Wms. 663. Miles v. Williams,
1 P. Wms. 252.

S. C. Part of a rent may be granted, but not a new rent reserved or granted out of the old one. Advowsons are rents within the statute of frauds, but an annuity in fee is not a personal inheritance. An annuity in fee is not assets, neither does it go to executors.

Vide Co. Litt. 20.

13. An annuity to a minister of Baptists established as a good charity, like that to Quakers, and to go to the successor for the time being.

4 May 1751, cor. M.R. abf. C.
Attorney-General v. Cock,
2 *Ves.* 273.
Vide Ashburnham v. Kirkall.

14. Annuity to a guardian or trustee, soon after coming of age, set aside upon general principles of public utility, and also upon particular circumstances of imposition.

25 July 1754, cor. Hardw. C.
Hylton v. Hylton, 2 *Ves.* 548.

S. C. Not so if done with open eyes, and, as a remuneration, after the ward is put into possession and at liberty, *sui juris*.

15. Bill filed by a tutor for an annuity of 200*l.* for his own life against the executors of the pupil, supported by letters referring to an annuity, (but without any specific length of time named,) dismissed without costs.

H. 1779, cor. Thurlow, C.
Jamefon v. Skipwith & al.
1 Bro. Cb. Ca. 34.
Affirmed in Dem. Proc. 14 Mar.
1780.

16. *N. T.* devised an annuity of 300*l.* to his wife for life, then to accumulate to make a portion for his first daughter who should marry; then in order to raise portions for other daughters, then to remain to his eldest son, and on his decease to the heirs male of his body; and in case of his having no issue, remainder to his (testator's) next eldest son, and his heirs male. The daughters married in the life of the wife; the eldest and two other sons of testator died, leaving a wife without issue. This is not personal estate vesting absolutely in the eldest son, (on the principle that it would be an estate-tail in land,) neither does it vest as an executory devise in the fourth son of testator who survived; but it is an annuity, and being exhausted

M. 1783, cor. Lds. Comrs.
Turner v. Turner,
1 Bro. Cb. Ca. 316. *Amb.* 778.

Doctor and Student, dial. 1.
c. 30. p. 97. Co. Litt. 20. 41.
Buckley v. Lord Stafford, 2 *Ves.*
170. *Weeks v. Peach*, 2 Lutw.
1218.

by the events, there being nobody to take it as such, sinks into the residuary estate of the testator.

P. 1784, Canc.
Lady Holderness v. Marg. Carmarthen & al.
1 Bro. Ch. Ca. 377.

17. An annuity of 4000*l.* charged upon the post-office (until a sum of 100,000*l.* should be paid in order to be laid out in land) continues to be a mere personal annuity, and as such to pass by grant or transfer.

E. 1786, cor. Thurlow, C.
Henley v. Aston,
2 Bro. Ch. Ca. 19.

18. Annuity for the joint lives of plaintiff and his uncle, for a sum of money to be paid on the death of the uncle *without issue*, and the annuity paid during the uncle's life. Bill to set it aside dismissed.

P. 1787, Canc.
Heathcote and another v. Paignon & al. 2 Bro. Ch. Ca. 167.
Vide Griffith v. Spratley, in Scacc. 21 June 1787.

19. Grant of an annuity for four years purchase on a life of thirty set aside for inadequacy of price.

M. 1788, Canc.
Fox v. Mackreth and others,
Pitt v. Mackreth and others,
2 Bro. Ch. Ca. 400.
Chesterfield v. Janßen,
1 Atk. 301.

20. Grant of annuities at six years purchase, where the grantee was accountable to the grantor for the price obtained for an estate of which he was trustee to sell for payments of debts, set aside.

T. 1796, in Scacc.
Speed v. Phillips, 3 Anstr. 732.
Barnard & Flint, 3 Anstr. 734. (n.)
Vide Heathcote v. Paignon,
2 Bro. Ch. Ca. 175. *Griffith and Spratley*, 2 Bro. Ch. Ca. 179. (n.)

21. Mere inadequacy of value given is not a sufficient ground to set aside an annuity.

In inquiring into the value of an annuity, the market price is the only criterion.

19, 21, 23, 28 June 1797, cor. M. R.
Hyde v. Price, 3 Ves. jun. 437.
Vide Corbett v. Poelnitz,
1 Term Rep. B. R. 5. *Hatchett v. Eaddley*, 2 Blackst. 1679.
Lean v. Schutz, 2 Blackst. 1195.
1 Blackst. Com. 443. *et vide* Notes to 12 edit. *Cauel v. Shaw*, 4 Term Rep. B. R. 361.
Read v. Jewson, H. 13 Geo. 3. *Gilchrist v. Brown*, 4 Term Rep. B. R. 766. and *Ellah v. Leigh*,
5 Term Rep. B. R. 679. *Hulme v. Tenant*, 1 Bro. Ch. Ca. 16.

22. A trust in a deed of separation to permit *A.* to receive the dividends of stock for the maintenance and support of the wife, with a covenant of indemnity to her husband. A grant by her of an annuity out of the dividends was held void.

See more under *Rent Charge*.

Sec. 2. Of Annuities created by Will, and what the Parties entitled can claim under the Words of the Devise.

P. 1702, cor. Wright, C. S.
Quintine v. Yard,
1 Eq. Abr. 74. pl. 19.

I. *B.* S. in 1661 made his will, and among other legacies devised an annuity of 20*l.* to *C.*, payable quarterly, and gives other legacies, and then has this clause: *All the rest of my real and personal estate not before bequeathed, my debts being paid,*
I give

I give to my brother J. S.; and makes him sole executor; and he paid the annuity several years, and made his will, and charged all his real and personal estate with this annuity, and devised all his real and personal estate in *England* to his two daughters the defendants, and all in *Barbadoes* to his two daughters there, who were not parties to this suit. The defendant paid the annuity several years, and then stopt, pretending that the words in the will of B. S. did not charge his real estate with the annuity; or if they did, yet the personal estate ought to be first exhausted, which it did not appear to be: and the real and personal estate in *Barbadoes* being equally liable by the will of J. S., the daughters there ought to have been parties, for they might have made satisfaction, or they ought to be before the court, that they might be decreed to pay their proportion. *Per cur.*—That is not practicable in this case, and ought not to be required: the lands were charged by the will of B. S., and if any satisfaction has been made by the daughters in *Barbadoes*, defendants must shew it.

2. J. devises 100*l.* per ann. to his son A. and his wife, for their respective lives, 60*l.* whereof to be paid to the wife for the support of herself and daughter, the remaining 40*l.* to the son; the son dies: his wife shall have the whole 100*l.* per annum.

H. 1731, cor. Jekyll, M. R.
Cowper v. Scott & al.
3 P. Wms. 121.

3. An annuity of 40*l.* devised to a wife is no satisfaction of a bond for 1000*l.* settled on her previous to her marriage.

T. 1744, cor. Hardw. C.
Jebson v. Pelly, 9 Mod. 437.

4. A legacy given in consideration of paying an annuity. Legatee dies in the lifetime of testator. The legacy shall fall into the residuum, but the annuity shall be a subsisting charge thereon.

4 Nov. 1748, cor. Hardw. C.
Oke v. Heath, 1 Ves. 141.

5. Testatrix gave 500*l.* stock, long annuities, to A.; the same to B.; 200*l.* long annuities to C.; the interest thereof to accumulate; an inquiry admitted into the state of her property, to shew she meant such sums of money, not annuities of this amount.

14 July 1785, cor. Thurlow, C.
Fennereau v. Poyntz,
1 Bro. Ch. Ca. 472.
Vide Dyosé v. Dyosé.

6. Testator made his will, and gave to his daughter 100*l.* a year long annuities; he then gave to the plaintiff 50*l.* long annuities, and to J. B. 50*l.* long annuities. These legacies shall be 50*l.* a year annuities.

27 July 1785, cor. Thurlow, C.
Stafford v. Horton,
1 Bro. Ch. Ca. 482.

See more under *Estate, Legacy*.

Sec. 3. In what Cases an Annuity given by Will shall be secured to the Devisee.

T. 1723, cor. M. R.
Batten v. Earnley, 2 P. Wms. 163.
 2 Eq. Abr. 456. pl. 9.

1. ONE by will gives an annuity out of his personal estate; if the executor has misbehaved himself, by threatening to defeat the annuity, the court will order part of the personal estate to be set aside to secure this annuity.

T. 1726, cor. M. R.
Grenon v. Rawson,
Ex. Ca. in Ch. 57.
Vide Trevor's case.

2. A man makes a deed-poll for payment of an annuity, and after by will subjects his estate to the payment of it, he shall have further security, and not rest on the deed-poll.

M. 1734, cor. Talbot, C.
Slanning & al. v. Style,
 3 P. Wms. 336.
 2 Eq. Abr. 65. pl. 10 454. pl. 12.
Vide Batten v. Earnley, 3 P.
 Wms. 163. *Rex v. Ravens*,
 3 P. Wms. 337. (n.) and Salk.
 209. and 1 Vent. 335. S.C. where it is said the ordinary cannot refuse probate to an executor, because *incapax*.

3. Where one by will charged the residue of his personal estate with 40 *l. per ann.* to his wife, to be paid quarterly, the executor was ordered to bring before the Master sufficient in bonds and securities to be set apart to answer this annuity.

14 April 1766, Dom. Proc.
Lady Herbert v. E. of Powis and others, 6 Bro. P. C. 102.

4. An administrator *de bonis non* verbally promising to pay an annuity given by the testator's will, does, under certain circumstances, make himself personally liable to such payment.

See more under *Executor, Legacy*.

Sec. 4. Of Exchequer Annuities.

10 June 1714, Dom. Proc.
Tooker v. Wilson, 1 Bro. P. C. 494.
 2 Eq. Abr. 597. pl. 14. 608 pl. 3.
 15 Vin. Abr. 476. pl. 7.
 1 P. Wms. 261.

Mr. P. Williams, in his report of this case (*nomine* Tucker *v. Wilson*) makes Wilson the administrator of Thynne, whereas Wilson was the lender of the money, and Tooker the administrator of Thynne the borrower. He also says, "the lender dying suddenly, the defendant his administrator sold the annuities at the Exchange by a sworn broker;" but this is clearly a mistake; for Wilson the lender appears to be the party prosecuting the appeal. Mr. P. Williams also is mistaken in his chronology, for Lord Harcourt's decision was in T. 1713.

Vide Lockwood *v. Ewer*, 2 Atk. 303. where Lord Hardwicke thought it not necessary to foreclose on a mortgage of stock.

THERE is a difference between mortgages of Exchequer annuities and common stock, which is of imaginary value only, but annuities are a certain security, and carry a constant interest; there is no necessity however upon a forfeited mortgage of Exchequer annuities previously to foreclose the equity of redemption, as in the case of land; for where Exchequer annuities were assigned by way of mortgage to secure 5000 *l.* and interest, the money not being paid, the mortgagee sold the annuities on the Exchange at the market price, which by the lords was held a good sale; and Lord Harcourt's decree in this case to the contrary was reversed upon the present appeal.

In *Manning v. Scott*, 14 Nov. 1714, annuities mortgaged were held irredeemable after forfeiture, unless there be an express agreement that mortgagee may sell after forfeiture. In *Lockwood and Ewer*, Lord Hardwicke refused to decree a redemption (after forfeiture) of East India stock mortgaged in favour of the executor of the mortgagor, the stock having materially risen, and a lapse of twenty-one years taken place.

See more under *Stock*.

Sec. 5. Of the Apportionment, Continuance, and Determination of an Annuity.

1. **W**HERE an annuity or rent charge is payable at *Lady-day* and *Michaelmas*, and the annuitant dies after sun-set on *Michaelmas* day, his executors shall have half a year's arrear. *Secus*, if he had died on *Michaelmas* day before sun-set.

Mr. Justice Tracey, who told him he had advised with Lord Ch. J. Hale at his chambers, and that upon a view of the several authorities relating to this point his Lordship

1 *P. Wms.* 179. (n.)
Bellasis v. Cole, cited in Lord Rockingham v. Dr. Penrice, 1 *P. Wms.* 177. This note of a case in ejectment, tried at Durham, 19 April, 13 W. 3. was communicated to the reporter by Hale at his chambers, and that was of the same opinion.

2. One devises an house to his cousin with an annuity of 1200*l.*, and that she shall maintain her son there: the son goes from her: she shall have her annuity the same as if he had died.

H. 1719, cor. Parker, C.
Blackbourn v. Edgley,
1 *P. Wms.* 604.
2 *Eq. Abr.* 62. pl. 3.

3. C. in 1720 gave 300*l.* for an annuity of 30*l.* per ann. for her life, payable out of a person's estate, who becomes a bankrupt in 1738. The commissioners to settle the value of her life, and C. directed to be admitted a creditor for such valuation, and the arrears of her annuity, and not for the whole 300*l.*

1 Aug. 1738, cor. Hardw. C.
Ex parte Le Compte, 1 *Atk.* 251.

4. Where a bankrupt is under an agreement to pay an annuity, a value must be put upon it, and proved as a debt under the commission.

1 Aug. 1744, cor. Hardw. C.
Ex parte Belton, 1 *Atk.* 251.

5. D. by will gave to S. an annuity of 50*l.* to be paid by his executor during the life of the executor. S. died in the executor's lifetime. *Per cur.*—The annuity is not determined, but shall go to the executors of S. during the life of D.'s executor.

H. 1752, cor. Hardw. C.
Savery v. Dyer, *Amb.* 139.
1 *Eq. Abr.* 31.

6. An annuity by will to a wife unprovided for, upon deficiency of assets, not abated in proportion with other legatees upon the intent of testator.

6 July 1752, cor. Hardw. C.
Lewin v. Lewin, 2 *Ves.* 415.
Vide Brown v. Allen, 1 *Vern.* 21.
Alton v. Midlicot.

7. A bond given to A. in trust to secure the payment of an annuity of 40*l.* during the joint lives of Sir Edward Smith and petitioner the bankrupt's wife; he delivers up the bond on his last examination; she applies to the court, and prays the

22 Jan. 1753, cor. Hardw. C.
Ex parte Cuyllgame, 1 *Atk.* 192.
Lord Chancellor denied the latter opinion of Lord C. J. Parker in *Miles and Williams*, 1 *P. Wms.* 255. to be law.

assignee may deliver the bond to her trustee; and that the arrears of the annuity and all future payments may be made to her. Lord Chancellor ordered it accordingly.

M. 1783, cor. Lds. Comrs.
Turner v. Turner, Amb. 778.
Vide Weeks v. Peach,
2 Lutw. 1218,
Vide ante, f. 1. pl. 15.

8. One devised a personal annuity *de novo* to his wife for life, remainder to *A.* his eldest son and his heirs male, remainder to his next eldest son and his heirs male: he left several sons, *A.* the eldest son died without issue; and held the annuity was determined.

9 June 1796, cor. M. R.
Dommett v. Bedford,
3 Ves. jun. 149.

9. Annuity by will charged upon real estate for *A.* for life, payable to him only, upon his own receipt, and no other, and to cease immediately on alienation; ceases by the bankruptcy, and bargain sale of the estate of *A.*

See more under *Bankrupt.*

Sec. 6. How far Equity will assist in the Recovery of an Annuity where there is no Remedy at Law.

H. 1700, Cane.
Lightbone v. Weedon,
1 Eq. Abr. 24. pl. 7.

1. IF an annuity is granted by one to his house-keeper with a bond for payment of it, and the bond is lost, equity will decree payment of the annuity, for service is a consideration, and no *turpis contractus* is proved, therefore cannot be presumed.

30 May 1701, Dom. Proc.
Kirby, Executrix, v. Ormsby,
Colles' P. C. 134.
Note; The decree in this cause does not appear.

2. It seems that arrears of an annuity or jointure which accrued due during the time of a public rebellion, cannot be recovered under a bill in equity.

H. 1743, cor. Hardw. C.
Floyer v. Sberard, Bart.
Amb. 18.

3. An annuity not set aside for being bought somewhat too cheap, there being no imposition.

S. C. An annuity granted out of government securities standing in trustees names: bill to be paid out of the dividends; decreed accordingly.

16 May 1757, Dom. Proc.
Lord Carbery v. Weston, Esq. and others, 5 Bro. P. C. 240.
At the same time was heard another appeal between Lord Carbery and a Mr. Wilson in a cause of the same kind, which was supported and defended on the same grounds and determined in the same manner.

4. *A.* for 2100 *l.* grants an annuity for his own life of 300 *l.* a year to *B.*, and charges it upon an estate represented to be of the clear yearly value of 1000 *l.*, and *B.* agrees that *A.* shall be at liberty to redeem the annuity at six months notice, on payment of the purchase-money and all arrears. *A.* suffers the annuity to run greatly in arrear, and the estate turns out to be subject to prior incumbrances, exceeding its annual income. On a bill filed against *A.* for a specific performance of his covenant to pay

pay this annuity, the court decreed accordingly, and held, that *B.* was not obliged to resort to a remedy at law, or to the insufficient security of the estate.

Sec. 7. Where, and from what Time an Annuity shall carry Interest, and where Taxes or other Deductions shall be allowed.

1. IF one covenants to pay an annuity to *J. S.*, the covenantor shall not deduct for taxes; for the charge is on the person of the covenantor, and not the land.

M. 1709, cor. Cowper, C.
Robinson v. Stephens,
2 Salk. 616, 617.

S. C. So if *H.*, having a term for years, devises an annuity to *J. S.* and his heirs, there can be no deduction for taxes; for the term of years is no otherwise chargeable with it than as it is part of the personal estate, for it cannot be said to issue out of the term, when in point of duration it may continue much longer.

S. C. So if *H.* grants an annuity to *J. S.*, and afterwards secures it out of a real estate, there shall be no deduction for taxes; for the subsequent security cannot lessen the effect of his former grant, which in its creation was tax free.

As to the allowance of taxes for land on which an annuity is charged, *vide Wildey v. Coopers' Company*, cor. Harcourt, C. S. 1713, but more particularly *Atwood and Lamprey*, cor. Jekyll, M. R. M. 1719, *et vide ante*, f. 1. pl. 3.

2. An annuity left to the wife by the husband's will shall carry interest from the very day on which it was payable, and not from the subsequent day of payment only after the arrears incurred.

T. 1719, cor. Parker, C. on Appeal from a Decree of Lord Cowper.
Litton v. Litton, 1 P. Wms. 541.
2 Eq. Abr. 530. pl. 8.
Vide Batten v. Earnley, 2 P.

Wms. 163. *Lady Ferrers v. Earl Ferrers*, Ca. temp. Talb. 2. *Robinson v. Cumming*, 2 Atk. 411.
Newman v. Auling, 3 Atk. 579. Anon. 2 Vef. 661.

Note; To this case the reporter adds a *quære*, for it seems the arrears should carry interest only from the first day of payment after the annuity became due, whether half-yearly or quarterly; but the hardship of the principal case, and the weight of Lord Cowper's decree, by whom all the merits of this case were heard, seemed to influence the court in this matter.

3. A devise to trustees of a sum of money to be laid out in the purchase of an annuity *clear* for *A.* *Per cur.*—The proper meaning of the word *clear* is free from all taxes.

26 July 1742, cor. Hardw. C.
Hodgworth v. Crawley,
2 Atk. 376.

4. Where an annuitant has entered, and is in possession of the estate charged with it, the court will not oblige him to quit the possession till the grantor allows him interest for the arrears of his annuity down to the day.

16 Oct. 1742, cor. Hardw. C.
Robinson, Bart. v. Cumming,
2 Atk. 411.

5. Where an annuity is given to a relation for life, and it has been paid for any length of years without

28 Oct. 1747, cor. Hardw. C.
Nicholls v. Leeson, 3 Atk. 573.

Vide Afton v. Oriol College,
Case of Brazen-nose College.

without a deduction for the land-tax, it will be presumed to have been so paid by mutual consent, and the payer is not entitled to be relieved.

20 Feb. 1750, cor. M. R.
Morris v. Dillingham, 2 *Ves.* 170.
Vide Litton v. Litton,
1 P. Wms. 541.

6. Interest of arrears of annuity discretionary, and only to be allowed under certain circumstances.

15 Mar. 1792, cor. Thurlow, C.
Tew v. E. of Winton,
1 *Ves. jun.* 451.

7. Interest of arrears of an annuity settled in bar of dower refused, some contract being necessary for such interest; compassion, poverty, or that the feme borrowed money not sufficient.

See more under *Interest, Taxes*.

Sec. 8. Of the Memorial and Inrolment under the Statute 17 Geo. 3.

M. 1787, cor. Thurlow, C.
Sbrapnel v. Vernon, *Levick v. Morton*, 2 Bro. Ch. Ca. 268.

1. **T**enant in fee, or in tail *in equity*, is within the exception in the annuity act, 17 Geo. 3. as to the annuity being registered.

H. 1791 & P. 1792, cor.
Thurlow, C.

Davidson v. Foley,
3 Bro. Ch. Ca. 598.

Vide Hodges v. Money, 4 Term Rep. 500. *Et vide* Sherfon v. Oxlade, where B. R. expressly treated the warrant of attorney as a security within the act, 4 Term Rep. 824.

2. The warrant of attorney to confess judgment is an *assurance* within the annuity act of 17 Geo. 3.; therefore, if the memorial inrolled does not recite it, the memorial and all subsequent proceedings are void.

S. C. The court will not suffer the cause to stand over to inrol a new memorial.

P. 1792, cor. Thurlow, C.
Jackson v. Lever,
3 Bro. Ch. Ca. 605.

3. But a memorial of a contract to give good and sufficient landed security for payment of an annuity as a consideration for the conveyance of a real estate need not be inrolled.

27 Nov. 1792, cor. Lds. Comrs.
Mood v. Burlton, 2 *Ves. jun.* 29.
4 Bro. Ch. Ca. 121.

4. Deed reciting an agreement for sale of a life interest in stock, a memorial being registered under the annuity act, and there being a covenant to pay any deficiency beyond the produce to the extent of the annual sum specified, and a proportionable share in case of death between the days of payment, this is an annuity, not a sale.

S. C. Deeds to secure annuities are within the annuity act as well as deeds granting them.

Vide 3 Term Rep. B. R. 298.
1 Term Rep. C. B. 309. *Duke of Bolton v. Williams*, 3 *Ves. jun.* 138.

S. C. Assignment of stock in trust to pay two annuities of 50*l.* each to different persons for separate considerations of 400*l.* each, the memorial was of one annuity of 100*l.* to the trustee in trust

§ 8. *Memorial and Inrolment.*

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trust to pay 50*l.* to each *cestuy que trust* for the sum of 800*l.*, and omitted a contingent interest. The annuities are void, the memorial not being sufficient within the annuity act, as not containing a true description of the annuities, nor stating all the interests.

5. Annuities void; the real amount, the consideration, and mode of payment not being truly stated in the memorial, and the bond and warrant of attorney being only generally mentioned without the dates and names of the parties.

T. 1793, cor. Loughb. C.
Duke of Bolton v. Williams,
2 Ves. jun. 138. 154.
4 Bro. Cb. Ca. 297.

S. C. All the instruments securing an annuity make but one assurance; and if the memorial is defective as to one, that vitiates the whole.

Vide 2 Term Rep. C. B. 12.

S. C. Courts of common law, which will on their general jurisdiction enter into the validity of the warrant of attorney or judgment on motion, in the particular application under the annuity act, will only set aside the judgment or execution or warrant, but cannot order the bond to be delivered up.

Vide 4 Term Rep. B. R. 695.
and the cases cited n. (c).

S. C. The word "*such*" in the first section of the annuity act means every deed, &c. by which an annuity is granted, and does not refer merely to the instrument defectively stated in the memorial.

Sec. 9. Of the Assignment of an Annuity.

AN assignment of an annuity is within the annuity act; and if void, the assignee has no right to stand in the place of the original grantee, whom he has paid, for want of a good assignment; nor will the court direct an assignment, if the twenty days for inrolling the memorial are elapsed, for it would be void at law.

T. 1793, cor. Loughb. C.
Duke of Bolton v. Williams,
2 Ves. jun. 139.
4 Bro. Cb. Ca. 297.

S. C. The memorials of assignments of parts of a subsisting annuity must set out all the securities and the whole transactions. Where this was not the case, the court would not order a return of the purchase-money out of the arrears in court.

Sec. 10. Of the Repurchase and Redemption of an Annuity.

1. Plaintiff was entitled to an annuity of 200*l.* per ann. for life out of Sir R. L.'s estate, who was his eldest brother. The plaintiff sold to R. D. 150*l.*,

19 Nov. 1745, cor. Hardw. C.
Lawley v. Hooper,
3 Atk. 278, 279, 280.

150*l.*, part of the annuity, for 1050*l.*, and in the deed there was a proviso, that if the plaintiff should at any time be desirous to *repurchase* the said 150*l.* *per ann.*, and give six months notice in writing to R. D., his executors, &c. and pay the 1050*l.*, then R. D., his executors, &c. should reassign to the plaintiff. At the time the parties met for the execution of the deed, plaintiff was in perfect health, and under the age of 22 years, but was a prisoner in the *Fleet*. R. D. insisted upon an indorsement on the back of it, and signed by the plaintiff, that if the plaintiff should repurchase or redeem the said 150*l.* per annum, it should be upon payment of 1050*l.*, and 75*l.*, and all arrears. Plaintiff now brought his bill to be relieved, and that on payment of what shall be due for principal and interest, the defendant may be decreed to reassign the annuity. Lord *Hardwicke* was of opinion, the plaintiff in this case was entitled to a redemption, and that the annuity he granted ought to be reconveyed on his payment of the 1050*l.* with legal interest, the plaintiff being a prisoner and in distress at the time he was obliged to sign the indorsement for varying the original agreement, by contracting to pay the 75*l.* and all arrears; and his lordship directed, that if any sums were advanced for the insurance of plaintiff's life, they should be added to the 1050*l.*, and carry interest: and further, that what should have been received on account of said annuity, should be applied in part payment of the principal, interest, and insurance.

The court of Chancery hath very prudently avoided laying down any general rules in cases of this sort, beyond which they will not go, for fear the *schemists* for exorbitant interest should find out other means to avoid the equity of the court.

There is a strong foundation to consider this as a loan, for most of these bargains are merely loans, but turned into this shape to avoid the statute of usury.

There is little difference between the word *redemption* and *repurchase*; and in the indorsement in this case, they are used promiscuously, which shews the parties themselves considered it as a power to redeem.

There being no covenant to repay the money, does not make it less a mortgage, for the *Welch*, and most copyhold mortgages have not this covenant.

Lord *Hardwicke* was of opinion, that the difference in the value of annuities for one's own life, and that of another, has been entirely caused by the dealers in these annuities.

The variation of the terms in this case was taking advantage of the plaintiff's distress, and so infected the whole case, that Lord *Hardwicke* determined the whole agreement ought to be set aside.

2 Lady *C. H.* gave the residue of her estate in trust to pay the produce thereof to Lady *Dudley* for life for her separate use, and after her death to her children, and appointed *B.* executor: Lady *Dudley* wanting money took up 120*l.* of *B.*, and granted him an annuity of 20*l.* during his life, and directed *B.* to pay himself out of the produce of *C. H.*'s estate by quarterly payments. Lord *Hardwicke* said, *Lady Dudley might contract to raise money by loan, but not by annuity, as it is too large an anticipation, and therefore she was allowed to redeem the annuity from the beginning, though made irredeemable; and the payments already made were directed to be applied in discharge of the interest in the first place, and afterwards in sinking the principal, and the residue to be paid out of the produce of the testatrix's estate.*

29 July 1747, cor. *Hardw. C.*
Cawerley v. Dudley and another,
3 *Atk.* 541.

3. A grant of annuities during the life of the grantor in satisfaction and discharge of a debt, with power to repurchase and redeem the annuities, held part of the personal estate of the grantee.

10 Mar. 1750, cor. *Hardw. C.*
Longuet v. Scowen,
1 *Ves.* 402. 405.

The court leans against a contract for liberty to repurchase, where made at the same time with the grant, and endeavours to make it a redemption.

4. Taking an annuity worth nine years purchase at five years, is an unconscientious bargain, and the court will give the taker no assistance in a bargain for a repurchase.

31 Oct. 1783, cor. *Lds. Comrs.*
Vaughan v. Thomas,
1 *Bro. Ch. Ca.* 556.
Vide Heathcote v. Paignon,
2 *Bro. Ch. Ca.* 167.

GENERAL REFERENCES.

Abjuration, see *Diffinters.*

Adultery—*Baron and Feme.*

Assurances—*Deeds, Fines, Recoveries.*

Assurance, Policies of—*Trade.*

Authority

Authority—Power and Authority.

Audition—Sale, Purchase and Purchaser.

GENERAL REFERENCES.

A—y

Army, Commissions in, see Office and Officer.

B—a

Bankrupt.

Sec. 1. Of the Commission and Commissioners.

P. 1683, cor. North, C. S.
Alderman Backwell's case,
 1 Vern. 152. 2 Ch. Rep. 190.
 1 Eq. Abr. 52. pl. 1, 2.
Sed per Holt, C. J. in Meggot
v. Mills. Ca. in B. R. temp.
 W. 3. 159. Ld. Raym. 287.
 If a man contracts a debt while
 he is a dealer, and after leaves off
 trade, and then commits an act
 of bankruptcy, no creditor since
 he left off trade can sue out a commission; but if an antecedent creditor takes out a commission, the
 subsequent creditors may come in and join.

1. THE granting of a commission of bankruptcy
 is not discretionary but *de jure*, for though
 the words of the statute are, that the Chancellor
may grant, it is in effect *must*; so resolved by all
 the judges.

But though the granting a commission be *ex officio*, yet it must be on the petition of persons interested.

T. 1690, cor. Lds. Comrs.
Hitchcox & al. v. Sedgwick
& al. 2 Vern. 161.
 1 Eq. Abr. 323. pl. 5. 332. pl. 8.

2. Every one is bound to take notice of a commission of bankruptcy.

M. 1709, cor. Cowper, C.
Anon. 2 Eq. Abr. 98. pl. 1.
 Mol. de Jur. Mar. b. 2. c. 3.
 sec. 19. (n.) where it is said that
 goods once delivered to a master
 are not subject to attachment,
 but are as it were bailed to the
 ship until the freight and charges
 were paid.

3. Commissioners of bankrupt issued their warrant
 to seize goods of a bankrupt on board twelve ships in
 Topsham Bay; the goods were consigned to persons in
 Holland, who had not paid the bankrupt for them;
 the masters refused to deliver the goods notwithstanding
 the warrant, and this occasioned the commissioners
 themselves to demand the goods in person,
 which were still refused. The court, on motion for
 an order upon the masters for their contempt, ordered
 them to deliver the goods upon payment of the
 freight-money, and they to be indemnified by the
 creditors against the bill of lading, which was sent
 to the consignees.

T. 1715, cor. Cowper, C.
Ex parte Goodwin, 2 Vern. 697.

4. Statutes relating to bankrupts bind the courts
 of equity as well as at law.

5. Com-

5. Commissioners of bankruptcy having made an assignment of the bankrupt's estate, and afterwards given the bankrupt his certificate, cannot make a subsequent assignment, their commission being determined.

M. 1717, cor. Parker, C.
Jacobson v. Williams,
 1 *Eq. Abr.* 53. pl. 7.
 2 *Eq. Abr.* 124. pl. 2.
 1 *P. Wms.* 386.
Gibb. Eq. Rep. 140.

6. An extent and a commission of bankruptcy issue both the same day, the extent shall have the preference.

H. 1718, in Scacc.
Rex v. Earl, Bunb. 33.
Vide Rex v. Pixiey, Bunb. 202.

7. Commissioners cannot examine a bankrupt's wife against her husband touching his bankruptcy. By the common law she cannot be a witness for or against her husband *; and though the statute 21 *Jac.* 1. authorizes the commissioners to examine the wife touching any concealment of his goods or effects, yet neither that or 5 *Geo.* 1. c. 24. extends to examine the wife touching the bankruptcy of her husband, or whether he had committed an act of bankruptcy, and how and when he became bankrupt. And if the commissioners commit the bankrupt's wife for refusing to discover the goods and effects of her husband, or the time and manner of his becoming bankrupt, and keep her in prison till she shall make the last-mentioned discovery, the commitment is illegal, and she shall be discharged. Till 5 *Geo.* 1. c. 24. the commissioners could not examine the bankrupt himself touching his bankruptcy.

H. 1719, cor. Parker, C.
Ex parte James, 1 *P. Wms.* 611.
 2 *Eq. Abr.* 98. pl. 2, 3, 4.
 * 1 *Inst.* 6. 2 *Vern.* 79.
 12 *Vin.* 11. pl. 28.

8. Commission sued out by the bankrupt's father to obtain his discharge is an argument of fraud.

T. 1719, cor. Parker, C.
Ex parte Salkeld, 1 *P. Wms.* 563.
 2 *Eq. Abr.* 121. pl. 1.

9. Whether the king is bound by the statute of bankrupts. *Attorney-General v. Stannysforth & al.* *Bunb.* 98.

H. 1721, in Cam. Scacc.
 Cur. advif. vult.—*Vide post*, f. 13.

10. A commission was taken out, and not sat on till three months after; this plainly shews it was done to protect the estate; the commission shall be superseded for example sake, that such things should not be practised.

T. 1725, cor. King, C.
Comb's case, *Sel. Ca.* in Ch. 46.
 2 *Eq. Abr.* 128. pl. 2.

11. *Johnson* was both clerk and commissioner to a commission of bankruptcy, by which means he had fees for both, and thereby four commissioners were always present, including the clerk, whereas three are sufficient. On petition he was removed.

T. 1725, Cam.
Wood's case, 2 *Eq. Abr.* 103. pl. 2.
Sel. Ca. in Ch. 46.

12. If commissioners find a man a bankrupt who is not so, an action will lie against them.

T. 1725, cor. King, C.
Whitlock's case, *Sel. Ca.* in Ch. 46.
 2 *Eq. Abr.* 95. pl. 2.

M. 1725, in Scacc.
Rex v. Pixley, Burb. 202.

M. 1727, cor. M. R.
Small v. Audley and others,
 2 P. Wms. 429.

H. 1735, cor. Hardw. C.
Beasley v. Beasley, 1 Alk. 97.

H. 1735, cor. Talb. C.
Warrington v. Norton,
 Ca. temp. Talb. 184.
 2 Eq. Abr. 97. pl. 6.

His lordship said he knew of no particular act as distinct from another which can be called a *dealing*. It has been said, that the declaring him a bankrupt was the act meant; but that declaration of the commissioners being only discretionary, and for caution, and not at all binding to anybody, it is not probable that the act should intend that only a *dealing* which it has not any where given the commissioners a power to do; whatever is done in pursuance of the commission is a *dealing* in it, if ever so minute; and the rather, for these being remedial laws, are to be beneficially construed in favour of creditors. And said, he could not therefore put a narrower construction upon the words *dealt in* in order to overthrow this commission and all the just right of the creditors claiming under it. Ca. temp. Talb. 186.

Feb. 1739, cor. Hardw. C.
Ex parte Haliday,
 2 Eq. Abr. 98. pl. 7.
 7 Vin. Abr. 77. pl. 3.

This statute enacts that there shall not be paid out of the estate of the bankrupt any monies for expences in eating or drinking of the commissioners, or of any other person, at the times of the meeting of the commissioners or creditors; and if any commissioner shall order such expence to be made, or eat or drink at the charge of the creditors, or out of the estate of such bankrupt, or receive above 20s. each commissioner for each meeting, every such commissioner shall be disabled to act in any commission of bankrupts.

13. The statutes of bankrupt do not bind the crown.

14. No such thing as an equitable bankruptcy, but it must be a legal one.

15. Where there is a joint commission against two partners, each must be found bankrupt; and although one die, the commission may go on: but if one be dead at the time of issuing the commission, it abates.

16. A commission of bankruptcy issued against H. at eleven o'clock in the morning; at three in the afternoon the commissioners declare him a bankrupt, and execute an assignment at six, and then have notice that the bankrupt died at ten o'clock that day; this is a dealing within the act of 1 Jac. 1. c. 15. s. 17. and the proceedings shall stand.

17. On a petition against several of the commissioners, for taking more than 20s. a-piece at each meeting, and likewise ordering great sums of money to be charged for their eating and drinking, Lord Chancellor declared them incapable, by virtue of the statute 5 Geo. 2. c. 30. s. 42. to be any longer as commissioners in the execution of the said commission, and that no further proceedings ought to be had thereupon; and that all further proceedings be stayed. That the petitioners be at liberty to apply by petition to have the said commission renewed, and directed to such new commissioners as his lordship should think fit; and the petitioners and assignees' solicitors respectively to leave with the secretary of bankrupts the names of five persons, whom they shall propose for his lordship's consideration, in order that proper persons may be appointed commissioners in such renewed commission; and that the present assignees be removed, and after the commission shall be renewed, an advertisement is to be published in the Gazette, appointing a meeting of the creditors for choice of new assignees; and that after such choice, the surviving commissioners in the present commission, or any three of them, and the assignees so removed, do join with the major part of the com-

commissioners to be named in the renewed commission, in making an assignment of the said bankrupt's estate and effects to the new assignees; and that forthwith after the execution of such assignment, the *old assignees* do deliver over to the *new* all the effects of the bankrupt remaining in specie in their hands, custody, or power, and all books, &c. upon oath, and that they do deliver possession of the bankrupt's real estate to the *new* assignees; and that the *old assignees* * petitioned against do, out of their own pockets, pay the costs of the petitioner's present application, and the costs of renewing the said commission to be taxed by the Master in case the parties shall differ about the same.

* *Quære*, If it should not be commissioners?

18. No second commission can be taken out before a bankrupt has his certificate under the first; for till then nothing can pass to the second, at least of personal estate.

20 Mar. 1743, cor. Hardw. C.
Ex parte Proudfoot, 1 Atk. 252.

All future personal estate is affected by the assignment, and every new acquisition will vest in the assignees: but as to future real estate, there must be a new bargain and sale.

19. Under old acts of parliament a man was considered as guilty of a crime or tort in becoming a bankrupt.

29 Mar. 1743, cor. Hardw. C.
Ex parte Bennet, 2 Atk. 528.
Vide 1 Atk. 77. 219. 1 Jac. 1.
c. 15. f. 17. 2 Show. Rep. 516,
1 Burr. Rep. 31. 2 Burr. 717.

517. 8 Mod. 4.

20. Commissioners have no power to admit separate creditors to prove debts without the sanction of the court.

29 Mar. 1743, cor. Hardw. C.
Ex parte Sandon, 1 Atk. 68.

21. A commission of bankruptcy is an action and an execution in the first instance.

13 Mar. 1737, cor. Hardw. C.
Twiss v. Massey, 1 Atk. 67.
6 Aug. 1743, cor. Hardw. C.
68. *Ex parte Elton*, 3 Vef.

Ex parte Wilson, 1 Atk. 153. *Vide Ex parte Brown*, 2 Vef. jun. 239.

22. The statute 13 Eliz. gives commissioners an equitable as well as legal jurisdiction, and has been so construed ever since; and on petitions before the Chancellor he proceeds as in causes by a bill upon the rules of equity.

4 Nov. 1743, cor. Hardw. C.
Bromley and others v. Goodere,
1 Atk. 77.

23. A commission may issue against one partner for a joint debt, though an action cannot be maintained against one without joining the other two partners.

Aug. 1744, cor. Hardw. C.
Ex parte Crisp, a Bankrupt,
1 Atk. 133.
Vide post, f. 3. pl. 16.

24. Commissioners upon the day of choosing assignees are not to examine critically into the debt, but admit creditors for what they swear is

1 Aug. 1744, cor. Hardw. C.
Ex parte Simpson, 1 Atk. 68.

due to them as they are liable to an account afterwards.

A creditor by bond, and an open account likewise, shall be admitted to prove the bond, because the commissioners can still take the account; and upon a dividend he shall be entitled to no more than is due to him on balance.

22 Dec. 1744.
S. C. 70.

A creditor, in all cases of open accounts, ought not to be excluded till the account is taken, because then the choice of assignees might arise from a *minor* part in value of the creditors; but still, if commissioners have just grounds to doubt the debt, they do right to admit it only as a claim.

22 Dec. 1744, cor. Hardw. C.
Ex parte Kerney, 1 *Atk.* 55.

25. Petitioner had been assignee under a commission of bankruptcy, but was removed by order of Lord Chancellor, who directed him to account and convey, &c. to the new assignee, which he did; but being an embarrassed man, he requested the commissioners to give him their summons when he attended them, as a protection to him. On returning home from the commissioners he was arrested, and though he produced the commissioners' summons the officer kept him in custody several hours, and treated the commissioners' summons with contempt. Lord Chancellor censured the officer for his conduct, and ordered him to give security for his attendance *de die in diem* to answer interrogatories, or that he should stand committed for his contempt. Lord Chancellor, not knowing of any case in point, directed precedents to be searched, and recommended the officer to discharge his prisoner in the mean time.

22 Jan. 1746, cor. Hardw. C.
Ex parte Parsons, 1 *Atk.* 72.

26. The granting caveats against commissions of bankrupt upon petition to be heard by counsel before the same are sealed is very inconvenient, as it may give persons against whom commissions are to be taken out an opportunity of making away with their effects.

11 April 1747, cor. Hardw. C.
Ex parte Green, 1 *Atk.* 202.

Lord H. said, he would never tie up a bidding to such strict rules, and in this case ordered it to be opened again.

27. Advertisements in cases of sales before commissioners of bankrupt should not be *general* for a meeting in order to sell a bankrupt's estate, but ought to name the hour as *Masters* do; and after the time expired, if the commissioners are not gone, they should admit a better bidder, in order to give creditors as great satisfaction for their loss as possible.

28. An order had been obtained to read *inter alia* the examinations of *Margaret Lingood* taken before the commissioners under *Thomas Lingood's* bankruptcy. They cannot be read unless proved in the cause that there were such examinations taken before the commissioners; for the proceedings in a commission of bankruptcy against *Thomas* are, as to *Margaret*, *res inter alios acta*.

23 May 1747, cor. Hardw. C.
Eade v. Lingood and another,
1 Atk. 203.

29. A commission of bankruptcy cannot supersede a decree for a receiver, which is a discretionary power exercised by the court of Chancery with as great utility as any sort of authority that belongs to it, and is provisional only, and does not affect the right of the parties.

11 Aug. 1747, cor. Hardw. C.
Skip v. Harwood, 3 Atk. 564.

30. Lord Chancellor on a former application limited the examination of a bankrupt's mother before commissioners to her son's trading only; but upon a second application refused to restrain the commissioners from asking her any questions, or inquiring into any circumstances which might make him a trader.

24 Dec. 1747, cor. Hardw. C.
Ex parte Parsons, 1 Atk. 204.

S. C. His lordship would not make an order that the mother should have counsel upon her examination, because it might be made a precedent in other commissions, and he thought an inconvenience would arise if allowed in every case.

31. *A. B.*, instead of attending the commissioners, petitioned that he might be examined upon interrogatories, and have a copy thereof, and a month's time to prepare himself; and that the commissioners might be restrained from asking him particular questions in his business of a banker. Lord Chancellor will not restrain commissioners in their examinations as it would be attended with expence, and an inconvenience would arise from applications of this kind. Petition dismissed accordingly.

24 Dec. 1747, cor. Hardw. C.
Ex parte Bland, 1 Atk. 205, 206.

32. An order for dissolving an injunction *nisi* will be made absolute, notwithstanding the plaintiff is a bankrupt, unless he shews cause. Bankruptcy is no abatement.

10 Nov. 1748, cor. Hardw. C.
Anon. 1 Atk. 263, 4.

Note; In *Sellas and Dawson*, in 1790, (2 Anstr. 459. n.) Lord Thurlow said, this case was ill reported, and that the order which had been examined did not warrant this report.

33. The bankrupt acts are not adopted in Ireland.

26 Mar. 1750, cor. Hardw. C.
Ex parte Williamson, 1 Atk. 82. 2 Vef. 249.

Note; The Irish parliament have now adopted bankrupt laws by stat. 11 & 12 Geo. 3. c. 8, of the Irish acts.

Vide S. C. post, sec. 2. and notes.

S. C. Where a person carries on a trade in dominions belonging to the crown of *Great Britain*, and comes over to *England*, a commission may be taken out by a creditor in the place where he happens to be, as he has traded to this kingdom, and contracted debts here; *but the creditors* residing in such dominions have liberty to come over and prove their debts.

30 July 1751, cor. Hardw. C.
Ex parte Baz, 2 Ves. 388.

34. Proceedings under a commission of bankruptcy have been formed by way of analogy to the proceedings of the court as a court of equity; and whenever an account is to be taken, the court by its antient constitution is to be aided in taking it by some proper officer (as Masters now are), it being impossible for the court to take accounts originally.

Exceptions may be taken to a certificate of the commissioners of bankruptcy.

The commissioners or a Master may without an order proceed *ex parte*.

22 Jan. 1752, cor. Hardw. C.
Ex parte Wilson, *Ex parte Bradshaw*, 1 Atk. 218.

35. A commission of bankruptcy is as much *ex debito justitiæ* as a writ; and no instance where the court supercedes it without directing an issue, unless it appears to be taken out fraudulently or vexatiously.

6 Nov. 1766, cor. Camden, C.
Troughton v. Gitley, Amb. 630.
Vide Tudway v. Bourne, in Cane. S. P. was taken for granted.

36. Assignment by commissioners after the death of the bankrupt is good.

H. 1786, cor. Thurlow, C.
Ex parte Pagett,
2 Bro. Cb. Ca. 50.

37. Commissioners in the country can on no account take more than 20 s. for each sitting.

Vide Ex parte Haliday, 2 Eq. Abr. 98. pl. 7.

20 April 1790, cor. Thurlow, C.
Ex parte Comings, 1 Ves. jun. 112.
Vide Ex parte Green, 1 Atk. 202.

38. Upon bankruptcy the mode of selling an estate is left to the commissioners, not directed by the court, as in a sale by a Master.

T. 1790, cor. Thurlow, C.
Ex parte Goring, 1 Ves. jun. 169.

39. Commissioners not to decide whether an estate of a bankrupt shall be sold or not, there must be an order for sale; any creditor has a right to insist on it.

1 July 1790, cor. Thurlow, C.
Ex parte Grey, 1 Ves. jun. 195.

40. Bankrupt was prevented from surrendering because the commissioners did not attend at the day. On petition of the commissioners another day was appointed. The court blamed their conduct, and said the petition ought to have been by the bankrupt.

§1. *Commission and Commissioners.*

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41. A commission of bankruptcy differs from an execution in vesting all rights and possibilities of the bankrupt, the latter passes only what the sheriff seizes.

9 Feb 1793, cor. Loughb. C.
Ex parte Brown, 2 Ves. jun. 68.
Vide Ex parte Elton, 3 Ves.
jun. 239.

42. Bankruptcy of the plaintiff does not abate a suit, and the bill may therefore be dismissed with costs for want of prosecution.

T. 1794, in Scacc.
Davidson v. Butler,
2 Anstr. 460. (n.)
Vide Bramhall and Cross, in

Scacc. 1789. *Waugh and Austen*, 3 Term Rep. 437. *Sellas v. Dawson*, cor. Lord Thurlow, 1790, contra, 2 Anstr. 453. (n.)

43. Bankruptcy of the defendant does not abate the suit, and the plaintiff cannot therefore dismiss his own bill without costs.

T. 1794, in Scacc.
Rutberford v. Miller,
2 Anstr. 458.

44. A commission of bankruptcy is not now treated as an execution, for the distribution is equitable.

T. 1796, cor. Loughb. C.
Ex parte Elton, 3 Ves. jun. 239.

Sec. 2. Of the Trade, Occupation, or Profession which a Man must pursue before he can be adjudged a Bankrupt.

1. **A** Person being under the age of twenty-one bought goods, and after the age of twenty-one committed an act of bankruptcy, in respect of those goods, on which a commission issued. Lord Chancellor *Macclesfield* doubted whether he might not be a bankrupt, but King, Chancellor, was clear of opinion he could not; and said, if commissioners find a man a bankrupt who is not so, an action will lie against them.

T. 1725, cor. King, C.
Whitlock's case,
2 Eq. Abr. 95. pl. 2.
Sel. Ca. in Ch. 46.
Vide Raym. 443. 12 Mod.
243. 1 Atk. 146. *Green's Bank-*
rupt Laws, 31, 32.

2. Buying and selling stock will not make a man a bankrupt.

M. 1725, cor. King, C.
Cole v. Nutterwill, 2 P.Wms. 308.
Vide 13 & 14 Car. 2. c. 24.

3. Pawnbrokers are within the statutes of bankrupts, and seem particularly included in the general word *brokers* in the 39th section of 5 Geo. 2.; and so is a public officer as an exciseman if he will trade.

11 Dec. 1737, cor. Hardw. C.
Higmore v. Molloy, 1 Atk. 206.
Vide Green's Bankrupt Laws,
4 edit. 5.

4. The daughter of a freeman of London, if she trades separately from her husband, may be a bankrupt.

22 Jan. 1739, cor. Hardw. C.
Ex parte Carrington, 1 Atk. 206.
Vide 3 Burr. 1776. Blackst.
Rep. 570. *Ex parte Preston*,

Green's Bankrupt Laws, 8. Com. Dig. 521. *Ex parte Sydebotham*, 1 Atk. 146. Bull. N. P. 38. *Rex v. Cole*, Ld. Raym. 443. *Sed quare*, How a freeman's daughter can trade as a feme covert sole trader, unless her husband is also a freeman, for by marriage she forfeits her patrimonial freedom, though she may derive a new franchise from her husband; if she marries a non-freeman, (or, in the city language, an alien,) she is no longer free.

2 April 1742, cor. Hardw. C.
Ex parte Burchall, 1 Atk. 141.

5. The statute of the 10th Ann. c. 15. repeals only that part of the statute 21 Jac. 1. c. 19. which constitutes a bankrupt, but not the description of the trade or occupation of the person against whom the commission issues. A scrivener is comprehended in the words *bankers, brokers, and factors*, in 5 Geo. 2. c. 30. s. 39.

6 Aug. 1743, cor. Hardw. C.
Ex parte Nutt, 1 Atk. 102.

6. An executor selling off the stock of his testator, though it consists of wines, and he buys some others to mix with and fine them, will not make him a bankrupt; otherwise if he buys wines entire, and sells them to his customers entire.

24 Dec. 1747, cor. Hardw. C.
Ex parte Meymot,
1 Atk. 196. 199. 201.

Lord H., in this case, said,
"If I was obliged to give an
"opinion, I am rather inclined
"to think a clerk in holy orders
"may become a bankrupt."

7. A commission of bankruptcy taken out against the petitioner, who insisted that as a clergyman he is not liable to become a bankrupt within the intent of any of the bankrupt statutes. Lord Chancellor would not supercede the commission or direct an issue, but left the petitioner to his action at law.

S. C. The statute of 21 H. 8. will not exempt a clergyman from being a bankrupt, for he cannot take advantage of the breach of one law to excuse him from the breach of another.

S. C. Smuggling, though contrary to an act of parliament, is still a trading within the meaning of the bankrupt acts; and such persons liable to a commission.

S. C. A bargain or contract made by a person, contrary to statute 21 H. 8. s. 5. is void as to himself only, and he alone is liable to the penalty of the act.

S. C. A peer or member of the House of Commons, if they will trade, is liable to a commission of bankruptcy, otherwise as to infants.

24 Dec. 1747, cor. Hardw. C.
Ex parte Bland,
1 Atk. 205, 206.

8. The bare exchanging of notes with a bankrupt, or giving money for bank notes, cannot affect a person as a trader with that bankrupt.

26 Mar. 1750, cor. Hardw. C.
Ex parte Williamson, 1 Atk. 82.
2 Ves. 249.

Vide Bird v. Sedgewick, Salk. 109. where it was said that an English subject, trading hither from foreign parts, and gaining a credit in England, may be a bankrupt. The following cases, collected by Mr. Cooke in his Bankrupt Laws, 3d edit. p. 85 to 90, contain the whole doctrine on this subject. *Dodsworth v. Anderson*, Raym. 375. 2 Jon. 141. 2 Vern. 162. A who lived in Ireland, but often came to England and bought goods, which he sold in Ireland, and at one time sold goods in England, and at another in Ireland to be delivered in England, was held a trader within the bankrupt laws. *Ex parte Smith*, before Lord Hardwicke, cited Corop. 402.

9. Where a person carries on a trade in dominions belonging to the crown of Great Britain, and comes over to England, a commission may be taken out by a creditor in the place where he then happens to be, as he has traded to this kingdom and contracted debts here.

A person

A person who went from *England* to *Barbadoes*, where he was a factor and planter, and traded to *England* by sending goods from his plantations, and receiving goods back again bought in *England*, and disposed of goods in *Barbadoes* for merchants in *England* as a factor, was held subject to the bankrupt laws. *Alexander v. Vaughan, Cowp.* 398.—A native of *Scotland*, trading and residing there, came to *England*, and being there occasionally was arrested, and lay in prison two months, and was ruled to be within the bankrupt laws. Mr. *Cooke* from these cases makes the following deduction: Any person trading to *England*, whether native, denizen, or alien, though never resident as a trader in *England*, may be a bankrupt if he occasionally comes to this country, and commits an act of bankruptcy. The statutes are, as to the act of bankruptcy, confined to *England*. *Cooke's B. L.* 91.

10. Bankers, having taken upon them to act as scriveners, made it necessary for the legislature in the 5 *Geo.* 2. to add bankers as being liable to commissions of bankruptcy.

22 Jan. 1752, cor. *Hardw. C.*
Ex parte Wilson, Ex parte Bradshawe, 1 Atk. 218.

A person acting as a banker will be considered as one, although he does not keep an open shop.

Vide 2 *Show. Rep.* 153. pl. 136.

One *Anderson*, who traded in *Ireland*, adjudged a bankrupt within the statute; but then it was proved he came sometimes over to *Chester* to buy goods.

Cited in *Hitchcox and Sedgwick, 2 Vern.* 162.
Vide Bird and Sedgwick, 1 Salk. 110. *Raym.* 375.
2 *Jon.* 141. 2 *Vern.* 162.
Vide Cooke's Bankrupt Laws,

3d edit. 85 to 90, where the whole doctrine on this subject is laid down.

11. Drawing and redrawing bills of exchange for large sums, and a continuance of it, is a trafficking in exchange, and a trading which will make a man liable to a commission of bankruptcy, though a loss ensues to the bankrupt by so doing.

24 Feb. 1752, *B. R.* cor. *Lee, C. J.* upon an issue out of Chancery.
Richardson and another, Assignees, v. Bradshawe and others, 1 Atk. 128.
Vide Green's Bankr. Laws, 3.

12. A brick-maker taking the earth off the waste, for which he afterwards paid a consideration, and selling the bricks, is a trade within the bankrupt laws.

M. 1782, cor. *Thurlow, C.*
Ex parte Harrison, 1 Bro. Ch. Ca. 173.

13. Renting brick ground with a view to make bricks and tiles for sale, independent of a farm, is a purchase of the clay, and a trading within the bankrupt laws.

M. 1785, *B. R.*
Parker v. Wells, 1 Bro. Ch. Ca. 178. (n.)
1 *Cook's Bankr. Laws,* p. 52, fully reported.

Sec. 3. Of the Petitioning Creditor.

1. THE granting of a commission of bankruptcy is not discretionary, but *de jure*; for though the words of the statute are, that the Chancellor may grant, it is in effect *must*. So resolved by all the judges.

But though the granting a commission be *ex officio*, yet it must be on the petition of persons interested.

he left off trade can sue out a commission; but if an antecedent creditor takes out a commission, the subsequent creditors may come in and join.

P. 1683, cor. *North, C. S.*
Alderman Backwell's case, 1 Vern. 152. 2 *Ch. Rep.* 190.
1 *Eg. Abr.* 52. pl. 1, 2.
Sed per Holt, C. J. in *Meggot v. Mills, Ca.* in *B. R.* temp. *W.* 3. 159. *Ld. Raym.* 287.
If a man contracts a debt while he is a dealer, and after leaves off trade, and then commits an act of bankruptcy, no creditor since

2. A single creditor to whom 100*l.* was due by two notes, and 53*l.* part thereof not payable,

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(before

T. 1714, cor. *Harcourt, C.*
Ex parte Mackernesi, 1 P. Wms. 260.

2 *Eq. Abr.* 96. pl. 1. (before 5 Geo. 2.) sued out a commission, which was
The case is now altered by 5 Geo. 2. *Vide* next case (n.) set aside as irregular.

H. 1719, cor. Parker, C. 3. So also of a bond payable at a future day
Ex parte James, 1 P. Wms. 610. where the obligee took out a commission.

2 *Eq. Abr.* 96. pl. 2. S. C. 2 *Eq. Abr.* 96. pl. 2. S. C. Note; By 5 Geo. 2. persons having bonds, notes, &c. payable at a future day, may
98. pl. 2. S. C. petition for a commission.

H. 1721, cor. Macclesfield, C. 4. A bankrupt before bankruptcy gave a note to
Ex parte Lee, 1 P. Wms. 782. A. or order for 100*l.*; B. buys the note for 50*l.*

2 *Eq. Abr.* 97. pl. 3. B. may sue out a commission on this note. *Secus*
Vide Ex parte Thomas, 1 Atk. if the indorsement were after the bankruptcy;
73. Anonymous, 2 Willf. 153. *secus* of an assignee of a bond,
Bingley v. Maddison, 1 Cooke's Bankr. Laws, 2d edit. 22. *Medlicot's case*, 2 Sira. 899.

T. 1725, cor. King, C. 5. The clerk to a commission of bankruptcy, in
Moume and others, Creditors of the presence of the person at whose instance he
Abraham, issued out the commission, no other person being by,
2 *Eq. Abr.* 103. pl. 1. took away a scrutore and opened it, in which were all
Sel. Ca. in Ch. 45. the papers of the bankrupt, and made a pretended sale
by an appraiser. On petition he was ordered to be
examined on interrogatories as to the real value of the
goods, and to pay the value, and all costs occasioned by
this irregularity; and all the goods not disposed of
to be delivered over, and to be removed from the
clerkship.

M. 1726, cor. King, C. 6. He who has the body in execution cannot be
Burnaby's case, 1 Sira. 653. a petitioning creditor. It is a satisfaction in law,
Vide Reed, Stat. Law, 189. and a commission in such case was superseded.
Goddard v. Vanderheydon, 3 Willf.
271. S. P.

P. 1731, in Canc. 7. A commission of bankrupt was superseded
Medlicot's case, 2 Sira. 899. because granted upon the petition of an assignee
Ca. temp. King, 6. of a bond, who, though an equitable, is no legal
Vide Ex parte Hylliard, 1 Atk. creditor.
147. 2 Vef. 407. *Ex parte*
Lee, 1 P. Wms. 782.

1731, cor. King, C. 8. An assignee of an obligee is not a creditor
Anon. W. Kel. 6. that can take out a commission of bankruptcy.
This seems to be *Medlicot's case*, ante.

M. 1733, cor. King, C. 9. L. having two promissory notes signed by A.,
Ex parte Levi, payable to him or order four months after date,
7 *Vin. Abr.* 61. pl. 14. when about three months was to run, indorsed
2 *Eq. Abr.* 96. pl. 8. them to M. for goods then delivered, and A.
Vide 1 Atk. 201. *Ex parte* absconding about one month after, L., on M.'s
Hall, going to him, procures himself to be denied, and
then M. sues out a commission of bankruptcy
against L., who petitioned to supersede the com-
mission. By a late statute a creditor, by note pay-
able at a future day, may sue out a commission as
well as come in as a creditor; but the debtor's
denying himself to such a creditor is not an act of
bankruptcy, it must be a keeping-house, &c. in
order

Vide 5 Geo. 2. c. 30. s. 22.
which enacts, that it shall be
lawful for any person taking bills,
notes, or other security for mo-
ney, payable at a future day, to
petition for a commission, or join
in petitioning.

order to defeat or delay creditors of their debts, which could not be here, because *M.* had then no debt due to demand, so commission superseded. It was objected that *L.* was debtor to *M.* immediately upon the goods delivered, *sed non allocatur*; for per Lord Chancellor, it was part of the contract that *M.* would stay for the money till the notes became due.

10. Where a debt is due to a wife as administratrix, the husband alone cannot make oath of this as a debt due to himself in order for a commission of bankruptcy; therefore the commission was superseded, and restitution awarded,

M. 1734, cor. King, C.
Ex parte Scaples,
2 *Eq. Abr.* 129. pl. 4.
7 *Vin. Abr.* 67. pl. 10.

11. Defendant, became indebted to plaintiff in 1730, and afterwards committed an act of bankruptcy, upon which plaintiff (being the petitioning creditor) took out a commission against him, and in order to over-reach and make void as many of his conveyances and settlements, &c. as possible, the creditors on a bill filed endeavoured to prove him a bankrupt as far backward as they could; and did actually prove, to the satisfaction of the court, that he committed an act of bankruptcy in the year 1726. Then it became a question, whether the commission of bankruptcy, and all that was done under it, was not wrong in regard that the debt of the petitioning creditor, on which it was grounded, was contracted subsequent in time to the first act of bankruptcy? After argument and time taken to consider, Talbot, Chancellor, thinking the commission ill-founded, dismissed the plaintiff's bill without prejudice. But his decree was reversed by the Lords, 23 February 1737, their lordships being of opinion, that the petitioning creditor was a creditor at the time the commission issued, and that therefore the commission was good and valid in the law.

M. 1734, cor. Talb. C.
De Gols v. Ward,
Ca. temp. Talb. 243.
2 *Eq. Abr.* 97. pl. 4.
Vin. Abr. tit. Creditor and Bankrupt, (K. 2), c. 1.
1 *Cooke's Bankr. Laws*, 20.
Vide more of this case, 2 *Eq. Abr.* 119. pl. 3. nomine Read v. Ward, where the proceedings after the decree of reversal by the Lords will appear.
Et vide etiam post, f. 4. pl. 6.

12. The executor of a bankrupt, unless the commission against his testator be superseded, cannot take out one for a debt due to the testator.

30 April 1740, cor. Hardw. C.
Ex parte Goodwin,
1 *Atk.* 100, 101.

Petitioning creditor shall pay costs of superseades only, where a commission is superseded merely for a defect in form, and no doubt of the act of bankruptcy; otherwise if the act of bankruptcy had not been fully proved.

13. An arbitration bond is a debt at law, and binds the parties till the award is set aside for corruption

12 May 1742, cor. Hardw. C.
Ex parte Lingood, 1 *Atk.* 241.

ruption or partiality; and it is also a sufficient debt to support a commission of bankruptcy.

6 Aug. 1743, cor. Hardw. C.
Ex parte Wilson, 1 Atk. 152.

14. The clerk of the commission caused the bankrupt to be arrested at the suit of *T.*, the petitioning creditor and assignee, in the sheriff's court at *London*, for 8*ol.*, and then caused another action to be brought in *B. R.* for the same sum, and kept him in custody till *T.* had an opportunity of arresting him on the *B. R.* action, and afterwards charged him with another action at the suit of one *W.* The bankrupt applied to be discharged from both actions. *T.* and *W.* were directed by the court respectively to discharge him out of custody of the marshal, as the same attorney was concerned in both actions.

S. C. A petitioning creditor cannot arrest a bankrupt, because a commission is both an action and an execution in the first instance.

23 Dec. 1743, cor. Hardw. C.
Ex parte Ward, 1 Atk. 153.
A petitioning creditor's affidavit is general, and does not mention the particulars of the debt.

15. A petitioning creditor determines his election by taking out the commission, and cannot sue the bankrupt at law, though for a *debt distinct* from what he proved.

2 Aug. 1744, cor. Hardw. C.
Ex parte Crisp, a Bankrupt,
1 Atk. 133.

This point was decided upon a special verdict in *C. B.* 5 May 1744, upon an issue directed in this case, and confirmed by the opinion of the judges on the matter reserved.

16. A commission may issue against one partner for a joint debt, though an action cannot be maintained against one without joining the other two partners.

7 Aug. 1746, cor. Hardw. C.
Ex parte Lewes, 1 Atk. 154.

17. A petitioning creditor has not the same election as a common creditor; for if he was to elect to proceed at law it would supersede the commission.

4 Nov. 1747, cor. Hardw. C.
Ex parte Thomas,
1 Atk. 73. 126.
Vide Ex parte Lee,
1 P. Wms. 782.

18. A note given before an act of bankruptcy, though indorsed after, is a debt upon which the indorsee may take out a commission of bankruptcy against the drawer.

25 Mar. 1750, cor. Hardw. C.
Ex parte Williamson,
2 Vesf. 250, 251. 1 Atk. 82.

19. Affidavits of debts by petitioning creditors are necessary.

Equitable demands may be proved under a commission, though equitable creditors cannot take it out.

4 July 1751, cor. Hardw. C.
Flower v. Herbert, 2 Vesf. 327.

20. A debt upon account, though not liquidated, is a foundation for a commission.

6 Aug. 1751, cor. Hardw. C.
Ex parte Hillyard, 2 Vesf. 407.
1 Atk. 147.

21. If a debt in law is not made out, though ever so strong a case of a debt in equity, it will
not

not be a foundation for a commission of bankruptcy.

22. A joint creditor may petition for a separate commission, but the funds of each estate are applicable to the particular debts of such estate.

T. 1796, cor. Loughb. C.
Ex parte Elton, 3 Ves. jun. 239.

23. A creditor by compromising his debt after having struck a docket, forfeits the debt, and shall not afterwards be permitted to prove under a commission issued upon the petition of any other creditor.

30 Mar. 1797, cor. Loughb. C.
Ex parte Gedge, 3 Ves. jun. 349.

24. The bond upon suing out a commission of bankruptcy must be by the petitioning creditor, the commission therefore was superseded on account of his infancy.

14 Aug. 1797, cor. Loughb. C.
Ex parte Barrow, 3 Ves. jun. 554.
Vide 5 Geo. 2. c. 30. s. 23.

Sec. 4. Of the Act of Bankruptcy.

1. Commissioners cannot examine a bankrupt's wife against her husband touching his bankruptcy. By the common law she cannot be a witness for or against her husband *; and though the stat. 21 Jac. 1. authorizes the commissioners to examine the wife touching any concealment of his goods or effects, yet neither that or 5 Geo. 1. c. 24. extend to examine the wife touching the bankruptcy of her husband, or whether he had committed an act of bankruptcy, and how and when he became bankrupt. And if the commissioners commit the bankrupt's wife for refusing to discover the goods and effects of her husband, or the time and manner of his becoming bankrupt, and keep her in prison till she shall make the last-mentioned discovery, the commitment is illegal, and she shall be discharged. Till 5 Geo. 1. c. 24. the commissioners could not examine the bankrupt himself touching his bankruptcy.

H. 1719, cor. Parker, C.
Ex parte James, 1 P. Wms. 611.
2 Eq. Abr. 98. pl. 2, 3, 4.

* 1 Inst. 6. 2 Vern. 79.
12 Vin. 11. pl. 28.

2. *A. had a running account with B. a banker, and had 3000l. in his hands. B. paid A. 1000 l., for which A. instead of a receipt gave B. a promissory note, who assigned it to H., and then B. became a bankrupt. H. sued on the note, and A. not being able to prove on the trial that B. was a bankrupt at the time of the assignment, H. recovered; then A. brought a bill for an injunction, and to have a discovery whether the assignment was not made after the time it bore date.*

T. 1725, cor. King, C.
Packenham v. Bland & al.
Sel. Ca. in Ch. 42.
2 Eq. Abr. 95. pl. 7.

It was insisted that though this was a promissory note, it should be considered only as a receipt, *A.* having at that time money in *B.*'s hands, and it could not be imagined *A.* intended to be liable on the note at the same time that so much money was due; and if so,

No

that then the 1000*l.* should be taken as so much money paid, and deducted out of the 3000*l.* so he should come in for his distributive share of 2000*l.* of the bankrupt's estate, and not be a creditor for 3000*l.* and pay the 1000*l.*—But held as above.

No proof was made of the bankruptcy at the time of the assignment, only that he could not pay it, but never kept out of the way. King, Chancellor—That does not amount to an act of bankruptcy; and if people are so careless to give notes instead of receipts, it is most fit they should suffer, than innocent persons who know nothing of their transactions. Bill dismissed.

M. 1726, cor. King, C.
Blond's case, cited in *Burroughs v. Jamineau*, *Mof.* 3.

3. To stop payment, is no act of bankruptcy.

T. 1734, cor. Talbot, C.
Ex parte Barton,
2 *Eq. Abr.* 96. pl. 9.
7 *Vin. Abr.* 61. pl. 15.

4. B. was arrested for 28*l.*, and though he had money sufficient to pay the debt, yet chose rather to go to prison, in order, as he declared, to force his creditors to come to a composition. Per Lord Chancellor—This is an act of bankruptcy within 1 *Jac.* 1. c. 15.; though, without such intent, yielding himself to prison was not, unless he lay there two months: otherwise where the party procures himself to be arrested upon a sham debt; for that, by the statute of the 13 *Eliz.* c. 7. is immediately an act of bankruptcy.

23 Feb. 1737, Dom. Proc.
De Gols and another v. Jones
& al. 4 *Bro. P. C.* 317.
Forrest. 243. 7 *Vin.* 66. c. 9.
Eq. Abr. 97. c. 4. nomine *De Gols v. Ward.*

5. The committing a secret act of bankruptcy before the petitioning creditor's debt accrued, will not invalidate the commission sued out by him.

4 *Bro. P. C.* 327. (n.) 7 *Vin.*
119. c. 2. nomine *Ward v. Read.*

S. C. In what case a secret act of bankruptcy shall overturn all subsequent conveyances and securities made by the bankrupt, to the prejudice of his just creditors.

M. 1739, cor. Hardw. C.
Read v. Ward,
2 *Eq. Abr.* 119. pl. 3.
7 *Vin. Abr.* 119. pl. 2.

Lord Chancellor said, this was an extraordinary case, and he believed none like it before, and hoped never would again; and that therefore it was incumbent on the court to do all it could to prevent the like: and observed, that here appeared a scheme of fraud through many years to defraud just creditors.

6. An issue being directed to try the bankruptcy of John Ward, upon trial at bar in B. R. he was found to become bankrupt 26th August 1725, and now, upon the equity reserved, plaintiffs (trustees for the South-Sea Company) prayed an account, and to set aside conveyances that John Ward had made since his becoming bankrupt. The nature of the case (as stated by Lord Chancellor) was of a gentleman having a very great estate, and not much indebted, except the demand by the South-Sea Company. By deeds of conveyance of 25 and 26 August 1725, and by subsequent deeds, all the real and personal estate of J. W., even to household goods, are vested in trustees to pay pretended creditors, the son joining with the father, but not one of the pretended creditors; and no distress from any creditor, &c. Amongst the trusts is the extraordinary power in the deed of September 1725, for J. W.

J. W. to charge any other debts: and last of all, the whole surplus of all the estates is vested in the bankrupt's son. Then come the marriage articles in June 1729, and therein every one of the former deeds are recited to be in consideration of the marriage of the son with A. B. and 4000*l.* portion, (but not proved paid). The surplus agreed to be subject to a term of 200 years, to pay 400*l.* a year to J. W. for life, if he should particularly demand it, and then for his son and his wife: then J. W. was to purchase lands of 1000*l.* per ann. in tail general to his son, remainder to his right heirs, with power as to portions for children, and power for trustees to provide coach and horses for J. W. Then there is another deed of sooner date by the son, subjecting the manor of — to some uses. A bill was brought by the assignees to set aside these deeds, &c. An issue was directed, and the jury find J. W. bankrupt 26th August 1725, being the date of the first deed of release, by which that deed is over-reached. And the judges certify that this deed was the act of bankruptcy, as being made to defraud his creditors. Lord Chancellor—The question is, what the consequence of this verdict is, 1st, in law, and next in equity? At law, this deed and all subsequent ones are void. But it was objected from the statute 21 Jac. 1. that the commission of bankruptcy was not taken out till 20th November 1730, above five years after the act of bankruptcy; and by a clause in that statute, purchasers in such case are not to be impeached, &c. But his lordship held, that this clause only affects purchasers *bonâ fide*, without notice of the fraud and act of bankruptcy; and here the son must have had notice of the act of bankruptcy, so that the son is not protected by this deed. Next the consequence of this verdict in equity; and here his lordship took notice that there are circumstances of actual fraud, and that here appeared a long series from 1725. The power in the deed of September 1725 to charge the estate with any other debts is fraud apparent, because it reserves in effect the whole estate in the bankrupt himself, &c. The next consideration is, how far the several defendants are to be affected; and this is to be considered in two respects: 1st, under the deeds from 1725 prior to the articles; 2dly, how upon the marriage articles? 1st, As to the deeds prior to the articles, they concern the trustees for the pretended creditors, and those creditors; but no proof of any real

Lord Chancellor declared he had spoke with the C. J. of B. R. who had told him that the jury had found John Ward a bankrupt from executing the deed of 25 Aug. 1725, and that no act of bankruptcy was proved before or after, but the execution of that deed, and no other act of bankruptcy till 1726.

real debts, and the first deed for that reason found void, and therefore this is out of the case. Then the question is under those deeds, how it stands with the son? And his lordship held, that he is affected with the act of bankruptcy and fraud, being party to the first deed, &c.; and at best it is all voluntary as to him, and the surplus in all the subsequent deeds is reserved to him. Next as to the marriage: and here his lordship said was the only appearance of difficulty, so as to the persons provided for; and as to *J. W.* himself, he cannot partake of the consideration: all the parties to be considered are *Ward's* son, and his intended wife and the issue. 1st, As to the son; his case is not immediately the marriage-articles, he had notice of the bankruptcy of his father before. It was objected that the son is to be considered as a purchaser by the articles, and the statute not mentioning notice and where the commission is not sued out within five years, &c. But his lordship held, that *articles in equity are the same as actual conveyances at law, and not to be impeached in equity*; but held, that the son could take nothing under the articles but what he had before. But suppose it so, his lordship said, the clause in the statute 21 *Jac.* 1. is not to be considered in the large sense contended for, so as to extend to all purchases; but held that this clause is to be compared to the clause in the statute 13 *Eliz.* c. 7., which provides against purchasers having notice of the fraud. The statute 21 *Jac.* 1. takes notice of the former acts against bankrupts, and is for further provisions for creditors; therefore his lordship held this case like and warranted by the construction made on the several statutes about leases by ecclesiastical persons, 1 *Vent.* 244. *Bayly* and *Murrin*, the last resolution in that case. And so held that all the statutes against bankrupts are to be construed together, and to be considered all as one statute; and there was no pretence but that the son had notice, and therefore (the son) cannot protect himself under the statute. Next as to his wife and issue: the son's wife, for what appears, is an innocent person; no evidence to shew her father had any other notice than what appears from the deeds. But his lordship thought notice of the deeds was no notice of the fraudulent intent of these deeds, other than as to the son, who was party, &c.; and if the son's wife had no notice of the bankruptcy, she cannot be affected in equity by the bank-

bankruptcy. Next as to the issue of the marriage: 1st, as to the heirs of the body of the son, that is an estate-tail in him; and his lordship agreed, that in *marriage-articles*, where the limitation is to the heirs of the body by the wife, there it shall be carried into strict settlement, but otherwise where the limitations is general to all the issue; and that this was the real intent appears by the provision of 6000*l.*, which is expressly for the issue of the marriage, and extends to the eldest son as well as to the rest of the children. This 6000*l.* is secured by a power and trust; and his lordship held that the issue are to be affected with the notice to the father and mother and trustees. As to plaintiff's objection, that the provision is of the surplus only after the fictitious debts paid, this would be strange, and their provision ought to be what was really due. As to the bankrupt's power to charge other debts, his lordship held his joining in the marriage-articles was an extinguishment of that power, and amounted to a revocation. *Ergo*, decreed the marriage-articles to be set aside as to all the uses, except as to the jointure of the wife, and the 6000*l.* for the issue.

7. Where there is a doubt of the bankruptcy, and the bankrupt is out of the kingdom, the court will not supersede the commission on petition, but send it to trial: but where the bankrupt is at home, the court will send it back to the commissioners, to consider if on the evidence they can declare him a bankrupt or not.

11 June 1743, cor. Hardw. C.
Ex parte Gullston, the Bankrupt,
Ex parte Dale, cross Petition,
1 Atk. 193.
Vide Green, 40, 41.

8. Absconding to avoid an attachment upon an award for non-delivery of goods pursuant to an award, is not an act of bankruptcy within the statute of Jac. 1. c. 15.; but it must be a departing from the dwelling-house to avoid the payment of a just and true debt, and not the delivery of goods; for that is a duty only.

28 Mar. 1747, cor. Hardw. C.
Lingood v. Eade, 1 Atk. 196.

9. By an act of bankruptcy, all the bankrupt's real and personal estate vests in the assignees from the time it is committed, and it controls all subsequent acts of the bankrupt with regard to fairness or fraud in them; so that a sale of goods, by bankrupt, after the act committed, is a sale of the property of the assignees, for which they may maintain trover: so it is as to the payment of money.

25 Nov. 1749, cor. Hardw. C.
Billon v. Hyde, 1 Ves. 328.
1 Atk. 126.
Vide Rider v. Fowle, 3 Lev.
58. *Willson v. Boulter, B.R.*
H. 13 Geo. 1. in Raym.

1 Aug. 1750, cor. Hardw. C.
Clavey v. How, 2 *Ves.* 19.
Vide Twine's case, 3 Co. 80.
Jacob v. Sheppard, 1 Burr. 478.

21 Dec. 1753, cor. Hardw. C.
Ex parte Hall, 1 *Atk.* 201.

It appears that H. and his wife were both in bed, the wife spoke out of the window to the persons who called; they refused to tell their names, when she said,

"Whoever ye are, if you will come to-morrow, or any other proper time, you may speak with my husband." On the evidence of the persons who called, (one of whom was a creditor,) the commissioners declared the petitioner a bankrupt. *Quod mirum!* *Vide Whitlock's case*, Sel. C4. in Ch. 46. where it is said, if commissioners find a man a bankrupt who is not so, an action will lie against them.

A denial to a creditor whose security is payable at a future day is not an act of bankruptcy. *Vide Ex parte Levi*, 7 Vin. Abr. 61. pl. 14. *ante*, f. 3. pl. 9.

This case was so flagrant, that Lord H. said, in a second such attempt he would commit the solicitor.

5 Mar. 1754, cor. Hardw. C.
Barwell and others v. Ward and others, 1 *Atk.* 260.

T. 1781, cor. Thurlow, C.
Hassell and another, Assignees, v. Simpson, 1 Bro. Ch. Ca. 99.

Vide Dougl. 89. 1 Cooke's Bankr. Laws, 110, 111. *Kettle & al. Assignees, v. Hammond*, Hil. T. 1767. accord.

* The deed itself created an insolvency in the trader; for after having assigned over all he can have nothing to trade with. *Vide Law and Skinner*, 2 Blackst. Rep. 996.

3 June 1790, cor. Thurlow, C.
Ex parte Thompson,
 1 *Ves. jun.* 157.
Vide Ex parte Gedge,
 4 April 1797.

H. 1792, cor. Thurlow, C.
Ex parte Cockbott,
 3 Bro. Ch. Ca. 502.

10. A deed, though made for the benefit of creditors, may be evidence of an act of bankruptcy.

11. A person denying himself to a creditor who called at 11 o'clock at night, is no act of bankruptcy, for it cannot be said to be done *with an intent to defraud* his creditors, which is the ingredient the acts of parliament require to make a man a bankrupt.

"Whoever ye are, if you will come to-morrow, or any other proper time, you may speak with my husband." On the evidence of the persons who called, (one of whom was a creditor,) the commissioners declared the petitioner a bankrupt. *Quod mirum!* *Vide Whitlock's case*, Sel. C4. in Ch. 46. where it is said, if commissioners find a man a bankrupt who is not so, an action will lie against them.

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S. C. Lord Hardwicke however referred it to a Master to settle the costs, and ascertain the damages sustained by the petitioner, and the petitioning creditor to pay the amount in a fortnight, otherwise the bond to be assigned, in order that a jury may give damages to the value of the whole penalty, if they should think fit.

12. Where the act of bankruptcy is lying in gaol two months, a person shall be deemed a bankrupt from the first day of his surrender to prison by relation, so as to over-reach all intermediate transactions.

13. A conveyance of all * a trader's goods (he being solvent at the time, and continuing in trade three years after) held by the Lord Chancellor not an act of bankruptcy, and a new trial ordered, the jury on the first having found him a bankrupt. On the new trial, and a case reserved and argued in B. R., it was determined to be an act of bankruptcy.

14. Payment of a bill of exchange after the holder had issued a commission is an act of bankruptcy. The holder was ordered to refund, and the commission superseded.

15. A fraudulent surrender of a copyhold estate is not an act of bankruptcy under 1 Jac. 1. c. 15. s. 2., for no process can issue to levy a debt on a copyhold estate.

Sec. 5. Of Creditors and Proof of Debts.

1. A Man buys lands and has a conveyance, and before payment of his purchase-money he becomes a bankrupt; the vendor shall not be put to come in as a creditor for the purchase-money, but there is a natural equity without any special agreement, that the land shall stand charged with payment of the purchase-money.

M. 1684, cor. North, C. S.
Chapman v. Tanner, 1 Vern. 268.
1 Eq. Abr. 56. pl. 1.

2. One lends money to a bankrupt after commission sued out, but without notice of the commission. By two lords commissioners against one (who doubted) he cannot come in as a creditor under the statute.

T. 1690, cor. Lds. Comrs.
Hitchcox & al. v. Sedgwick & al.
2 Vern. 157.
1 Eq. Abr. 323. pl. 5. 332. pl. 8.

3. Plaintiff lent a sum of money on mortgage of houses, and took a mortgage bond; afterwards he lent 2000*l.* on the equity of redemption, and took a bond likewise. Mortgagor became bankrupt, and the houses were inadequate to pay the money first lent. Plaintiff brought his bill to have them sold, and to come in as a creditor upon the bankrupt's estate for the deficiency. Decreed.

P. 1695, Canc.
Wiseman v. Carbonell,
1 Eq. Abr. 312. pl. 9.
Vide Ord. Curiz, 8 Mar. 1794,
post.

4. A creditor by statute should only come in *pro rata*, if the statute be not sued and executed before the bankruptcy, though the lands in fee were bound by the statute.

P. 1706, C. B. referred from C.
Sir George Newland and another,
Executors v. —,
1 P. Wms. 92.
2 Eq. Abr. 116. pl. 1.

as to creditors by judgment, statute, or recognizance. *Vide Orlebar v. Fletcher*, where a judgment creditor, seeking to extend the bankrupt's lands in the hands of a purchaser, was decreed to come in *pro rata*. 1 P. Wms. 737.

Vide 21 Jac. 1. c. 19. s. 9.

5. A being seised of several copyholds in fee, mortgages them; and afterwards mortgages part of them to another, and then mortgages other part of them to a third person; but there was no admittance, or if there was, it was entered in a wrong book of the manor. The mortgagee relied upon the mortgagor, who was deputy steward of the manor, to do every thing that was needful, but he entered the surrender in a wrong book, contrary to the custom. And afterwards mortgaged the land a fourth time; then he became bankrupt. *Per Lord Chancellor*—Where there is a second mortgagee of part of the lands that were before in mortgage, he shall not redeem part of the first mortgage, and so put the first mortgagee to seek what is due to him out of the residue of the lands,

M. 1709, cor. Cowper, C.
Wiseman v. Warren,
2 Eq. Abr. 595. pl. 9.
Vide Ord. Cur. 8 Mar. 1794,
post.

when he hath a precedent title to the whole; but paying all that is due, he shall redeem the whole. It was ordered that the second mortgagee should redeem so much as was contained in his own mortgage, the *Maher* settling the proportion the second mortgagee shall pay to the first. And it was also decreed, that the fourth mortgage being without notice of the third, and the third being entered in a wrong book, the third shall be postponed, and the fourth stand in the room of it: and that after the fourth mortgage is satisfied, the third shall be let in. It was objected, that the assignees of the bankrupt have the legal estate, and being creditors, have an equitable right, which will prevail against equity only. Lord Chancellor—They stand but in the place of the bankrupt, and this third mortgage would have been good against the bankrupt himself, and therefore shall be good against the creditors; and the third mortgagee shall come in as a creditor, to have his dividend of the bankrupt's personal estate, for so much as the third mortgaged lands fall short of satisfying what is due upon that mortgage.

T. 1710, Canc.
Holland v. Calliford, 2 Vern. 652.

* Lord Macclesfield is said to have doubted this point, Hil. 1720, *Ex parte Bayley*. *Vide Ex parte Caswell* and others, 2 P. Wms. 497.

T. 1713, cor. Harcourt, C.
Ex parte Smith, 1 P. Wms. 237.
2 Eq. Abr. 104. pl. 1.

6. *A.* on his marriage gives bond to leave his wife 500*l.*, or a third of his personal estate, at her election, the wife having had on her marriage a portion of 500*l.* secured by land. *A.* becomes bankrupt. Decreed the wife to come in as a creditor on her bond, and what shall be paid in respect thereof to be put out at interest, and the interest to be paid to the creditors during the bankrupt's life; and the principal to the wife if she survived her husband *.

7. *A.* lends money to *B.* and *C.* on bond. *A.* sues *C.*, and takes him in execution on a *ca. sa.*, whereupon *C.* pays *A.* 24*l.* *A.* then consents to his discharge. *B.* became bankrupt. On the authority of *Bower v. Swadlin*, 1 Atk. 294. it was contended, that the debt being entire in law, the whole debt was discharged. *Sed per cur.*—Let the obligee come in as a creditor under the commission against *B.* for a moiety of the remaining money due on the bond, for the execution against *C.* being subsequent to the assignment of *B.*'s estate, shall not discharge *A.*'s demand as to that estate; but in regard *B.* and *C.* were each in equity liable to half the debt only, and *C.* was not the original debtor for the whole, *A.* shall only have relief against *B.*'s

B.'s estate for a moiety *. And Lord Chancellor said, that if *B.* had been the original debtor, and had borrowed *all* the money, *A.* should have come in as a creditor for *all* his debt †.

† *Vide Ex parte Ryswicke*, 2 P. Wms. 89.

8. *A.* by articles was to build houses. *B.* furnishes him with materials, and takes an assignment of the articles for his security, but before the assignment *A.* was a bankrupt. *B.* has a special equity, inasmuch as by what he advanced, *A.* was enabled to perform his agreement to the common benefit of the creditors, and therefore *B.* shall have all the money he advanced after he had a specific interest in the articles; but as to what he gave credit for before, he trusted as another creditor.

9. If a man trade with a bankrupt between the act of bankruptcy and the commission sued out, whether by delivery of goods or payment of money, without notice of the act of bankruptcy, the bankrupt keeping open trade, such person shall come in as a creditor.

10. Creditors who come into the commission shall not imprison the bankrupt for not paying the debt.

11. Though a creditor proves his debt and becomes assignee, he may take the bankrupt in execution, if he will waive his benefit of the statute.

The reason of a creditor's proving his debt is, that he may oppose the bankrupt's discharge.

No election in case of a creditor's proving his debt to be paid out of the bankrupt's effects, if no effects.

12. On a petition praying to be admitted a creditor on a note, payable at a future day, given for goods sold and delivered, the commissioners having refused to admit the petitioner as such, in regard the bankruptcy was between the date of the note and time of payment. Parker, Chancellor, said, that this came improperly before him for his determination on a petition; that he had nothing to do in such cases, but to direct and see that the commissioners do their duty, and cannot order them to admit any one creditor. But said, he might stay so much money in the commissioners' hands as will answer the proportion of the debt in case it should be allowed of, and that a bill might be brought for that purpose in order to determine it. Objected that bankrupt might plead his certificate and discharge at law, if an action were brought on such a note. But *per cur.*

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—That

* *Quere*, Why not the petitioner come in for the remainder of his whole debt, since each obligor was liable for the whole.

P. 1715, cor. Cowper, C.

Langton v. Hall,

7 Vin. Abr. 73. pl. 4.

2 Eq. Abr. 108. pl. 1.

Lord Chancellor compared this to a case of a man building a ship who becomes bankrupt, and *B.* afterwards furnishes materials to finish it. *B.* shall have all his money, and not come in average with the other creditors.

T. 1716, Canc.

Croftley's case,

7 Vin. Abr. 69. pl. 6.

2 Eq. Abr. 104. pl. 2.

H. 1719, cor. Parker, C.

Ex parte James, 1 P. Wms. 612.

Vide Ex parte Salkeld, *post*.

Vide Anon. 2 P. Wms. 394.

T. 1719, cor. Parker, C.

Ex parte Salkeld,

1 P. Wms. 560. 561. 3.

Vide Ex parte Capot, 1 Atk.

219. *Ex parte Ward*, 1 Atk. 153.

Ex parte Lindley, 1 Atk. 220.

Ex parte Dorvilliers, 1 Atk. 221.

T. 1720, cor. Parker, C.

Burdock's case,

7 Vin. Abr. 69. pl. 7.

2 Eq. Abr. 104. pl. 3.

* *Quere* assignees hands.

Note; The law upon this subject is now altered; for by 5 Geo. 2. c. 30. s. 22. persons having bonds, notes, &c. payable at a future day, may not only prove their debts, but may petition for a commission.

—That is not so, because the clause says *causa actionis* accrued before the bankruptcy, which cannot be in this case till the money is payable; and why may not such a note for a precedent debt be said *debitum in presenti, et solvendum in futuro*. As to the honesty of the note, that may be inquired into, and will be no objection, because the honesty of a judgment, bond, &c. is liable to the same inquiry; and though *this note was given to S. who is now abroad, yet, it being now assigned to another, there is no occasion for an inquiry on what terms it was given him; and to call him to be examined to it because prima facie it carries the face of truth. It is usual not to grant a commission on the petition of creditors on such notes till the day of payment comes.*

H. 1722, cor. Macclesfield, C.
Ex parte Ryfwiche, 2 P. Wms. 89.
2 Eq. Abr. 116. pl. 2.

Note; It is very material to ascertain whether the 40*l.* was paid out of A.'s effects in C.'s hands, or out of C.'s own effects, for the reasons stated in the principal case.—Where several debtors for the same debt become bankrupts, the creditors shall be at liberty to prove the whole under each commission, if, at the time of proving, he has not actually received any part satisfaction, and he may receive dividends under every commission, so that he does not take more than 20*s.* in the pound on the whole debt. *Vide Cooper v. Pepys*, 1 Atk. 106. *Ex parte Wyldman*, 2 Vef. 113. & 1 Atk. 109. S. C.

It does not appear in what manner a creditor can prove the whole of a debt, when in fact he has received a part before the bankruptcy; for he is only damnified as to what was due at the time of the commission. *Vide Ex parte Marshall*, 1 Atk. 129. *Kettier v. Raynes*, Cooke's Bankrupt Laws, 176. or 205. in 4 edit.

M. 1722, in Scacc.
Long v. Bland, Bunb. 120.

T. 1726, Canc.
Crosley's case, 7 Vin. Abr. 110.
pl. 1. 2 Eq. Abr. 108. pl. 1.
Vide Com. Dig 527. 2 Blackst.
Com. 487. Atk. 156. 236.
Green's Bankrupt Laws, 112.

M. 1726, cor. King, C.
Ex parte East India Company,
2 P. Wms. 356.
2 Eq. Abr. 105. pl. 4.
Sed vide contra Pattison v.
Banks, Cowp. 540. *Brooks v.*
Lloyd, 1 Term Rep. 17.

13. A. draws a bill payable to B. on C. in Holland for 100*l.*; C. accepts it; afterwards A. and C. become bankrupts, and B. receives 40*l.* of the bill out of C.'s effects; after which he would come in as a creditor for the whole 100*l.* out of A.'s effects. B. permitted to come in as a creditor for 60*l.*, and the Master to see whether the other 40*l.* was paid out of A.'s effects in C.'s hands, or out of C.'s own effects; if the latter, then C. is a creditor for this 40*l.* also, but if out of A.'s effects, then 40*l.* of the 100*l.* is paid off.

14. A person giving a promissory note becomes a bankrupt before it is payable. The note is not discharged, *per* three barons against Price, B.

15. If a trader being indebted on simple contract pledges goods for the payment, and promises interest, such creditor shall have interest, even between the act of bankruptcy and the commission.

S. C. So for debts on specialty creditors shall have interest.

16. Regularly speaking, at common law none could come in under a commission of bankruptcy but such as were creditors at the time of the bankruptcy, because the bankrupt could not afterwards charge his estate. But now since 7 Geo. 1. c. 31. if A. gives a note under hand payable at a future day, before which day he becomes a bankrupt, in this

this case the creditor by note shall come in; but if a bond or note be given to pay money on a contingency before the happening of which contingency the obligor or giver of the note becomes a bankrupt, this is not within the statute *.

Ex parte Caswell, 2 P. Wms. 497. & Mr. Cox's notes thereon.

17. A. gives a promissory note for 200*l.*, payable to B. or order. B. indorses it to C., who indorses it over to D. A., B., and C. become bankrupts, and D. receives a dividend of 5*s.* in the pound under A.'s commission, he shall come in as a creditor for 150*l.* out of B.'s effects, and if he has paid contribution-money for more than 150*l.*, it shall be returned.

each commission, (but not more than 20*s.* in the pound altogether,) though he shall not be at liberty to prove under any one commission more than what remains due at the time of the proof made.

18. A trader on marriage gives a bond to a trustee to secure 1000*l.* to the wife if she survive him. The trader becomes a bankrupt. This debt shall not be allowed nor any reservation made for it, nor shall it stop the distribution in regard it may never be a debt (a): so within the same reason an obligee in a bottomree bond (b) shall not before the return of the ship come in under a commission of bankruptcy. But in either of these cases, if the contingency happens before the bankrupt's estate be fully distributed, such creditor shall come in for his proportion (c).

ruptcy.—Vide Ex parte Groome, 1 Atk. 115. Ex parte Winchester, 1 Atk. 120. Ex parte Greenaway, 1 Atk. 113. Goddard v. Vanderheyden, 3 Wils. 271. Hancock v. Entwistle, 3 Term Rep. 435. Where the contingency upon which the money is made payable is the bankruptcy or insolvency of the debtor, such debt cannot be proved under his commission. Ex parte Hill, Cooke's B. L. 282.

(b) The case of an obligee in a bottomree or respondentia bond is now provided for, 19 Geo. 4. c. 32. s. 2.

(c) *Sed vide* Ex parte Groome, 1 Atk. 118. *contra*.

S. C. But in the case above mentioned of the bond, the obligee, if he declares upon his bond only, shall be barred. *Secus* if in his declaration he sets forth the condition as well as the bond.

As to the case Ex parte Caswell (2 P. Wms. 497.), Lord Hardwicke, in the case Ex parte Groome, 1 Atk. 118. said, "It is barely an opinion of Lord King, and not the case in judgment; but he did *obiter* declare his opinion only. Lord Talbot afterwards doubted of Lord King's opinion; and "in a case before me since I have differed from him entirely, and see no reason to alter my opinion."

19. On a distress for rent goods were sold, and 77*l.* remained in the constable's hands, who became a bankrupt; the tenant dies, and his executor prays to be paid this money by the assignees, in preference to other creditors. Objected; this comes to the constable's

O 3

hands

Vide 5 Geo. 2. c. 30 s. 22. as to the proof of debts on securities payable at a future day.

* But if the contingency happens before the bankrupt's estate be fully distributed, such creditor shall come in *pro rata*. Vide

P. 1727, cor. King, C. Ex parte Lefebvre, 2 P. Wms. 407. 2 Eq. Abr. 116. pl. 4.

Vide Cooper v. Pepys, 1 Atk. 106. Ex parte Wyldman, 2 Vef. 113. & 2 Atk. 109. Ex parte Ryfwicke, 2 P. Wms. 87. Upon the authority of which cases it is now an established rule that the creditor shall receive his dividend on the whole debt proved under

M. 1728, cor. King, C. Ex parte Caswell, Cazalet, and Bateman, 2 P. Wms. 497. 499. Mos. 28. 79. S. C. *nomine* Cazalet Ex parte.

Vide Holland v. Callesford, 2 Vern. 662. Ex parte Bayley, cor. Macclesfield, in Hil. 1720.

(a) Tully v. Sparkes, Raym. 1546. Ex parte Jeffries, 7 Vin. 72. pl. 7. Ex parte King, Dav. 254. Hancock v. Entwistle, 3 Term Rep. 435.

Secus where the provision is secured by a judgment or bond forfeited at law before the bank-

ruptcy, 1 Atk. 116. Ex parte Mitchell, 1 Atk. 116. Ex parte Mitchell, 1 Atk. 116. Ex parte Mitchell, 1 Atk. 116. Ex parte Mitchell, 1 Atk. 116.

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Secus where the provision is secured by a judgment or bond forfeited at law before the bank-

(a) *Vide* Ex parte Peirson, cor. Lord Macclesfield, and Wright & Dixon therein cited.

Lord Chancellor said, it might have been otherwise if any thing had remained in specie; but here the money is embezzled by the constable.

M. 1734, cor. Talbot, C.
Ex parte Busb, 7 Vin. Abr. 74-
pl. 8. 2 Eq. Abr. 109. pl. 4.

hands by due course of law (a). *Per* Lord Chancellor—Though the law makes a difference between one creditor and another, yet in case of bankruptcy all creditors are upon an equal footing: therefore the petitioner must come in as a creditor with the rest.

20. An attorney had been employed by one who became a bankrupt. The assignees petition to have the papers delivered up, and that the attorney might come in for his demand *pari passu*, with other creditors. *Per* Lord Chancellor—The attorney hath a lien upon the papers in the same manner against assignees as against the bankrupt; and though this doth not arise by any express contract or agreement, yet it is as effectual, being an implied contract by law. But as to papers received after the bankruptcy they cannot be retained; and therefore if the assignees desire it, the bill may be taxed, and upon payment, the papers delivered up; and this although the attorney has come in and proved his debt; for a creditor who had a security may come in and prove his debt, because possibly his security may prove deficient.

31 May 1737, cor. Hardw. C.
Ex parte Holwell, Esq. 7 Vin.
Abr. 102. pl. 13. 2 Eq. Abr.
117. pl. 6.

21. T. S. mortgaged lands to W. for 1157 l., and afterwards mortgaged the same, together with other lands, to H., as a collateral security for 500 l. due by bond, and about ten days afterwards T. S. was declared a bankrupt. Part of the premises was sold for 1050 l., and the money paid to W., but the commissioners refusing to sell the residue, and the assignees refusing to satisfy the demand of H., or to admit him to have any share of the bankrupt's estate, he petitioned for a sale to be made of the rest of the mortgaged premises, and the money to be applied towards the discharge of the demands of W. and himself; and in case of any deficiency, then to be admitted a creditor on the said bankrupt's estate for what should remain due after such sale, and to stay any dividend in the mean time. Lord Chancellor referred it to the commissioners to take an account of what was due to W. and H. on their respective mortgages; and ordered the mortgaged premises remaining unsold to be sold, and the monies to be applied first in discharge of W.'s mortgage, and then of H.'s, together with his costs of this application, to be settled by the commissioners; and if the same should not prove sufficient to pay petitioner his principal, interest, and costs, then he to be admitted a creditor

Vide Ord. Cur. 8 Mar. 1794,
touching mortgages under com-
missioners of bankruptcy.

ditor for such deficiency, and to a dividend, &c.; and that *W.* and *H.* be examined touching the account, and to produce upon oath all deeds, &c.

22. Where a bankrupt's goods are sold by an assignee, a landlord can only come in for his rent, *pro rata* with the other creditors.

30 Ap. 1740, cor. Hardw. C.
Anon. 1 Atk. 102.

A mortgagee, who has paid the arrear of rent on a bankrupt's estate, unless he has an order to stand in the landlord's place, shall not be preferred to the creditors under the commission.

23. The petitioner's husband before marriage gave her father a bond in the penalty of 600 *l.*, conditioned for the payment of 300 *l.* to her in case she survived. The husband has a commission of bankruptcy taken out against him, and dies ten days after. The court thinking it a doubtful case, whether she should or should not be admitted a creditor, *did not give an absolute opinion*; but on the assignees consenting she should come under the commissioners for 150 *l.*, ordered her a dividend accordingly.

23 Dec. 1740, cor. Hardw. C.
Ex parte Greenaway, 1 Atk. 113.

Vide Holland v. Calliford,
2 Vern. 662.

S. C. The statute of 7 Geo. 1. c. 31. extends only to creditors at a future day *certain*, and not to debts on mere *contingencies*, which have not happened at the time of the act of bankruptcy committed.

Vide Ex parte Caswell,
Ex parte Cazalet,
Ex parte Bateman,
2 P. Wms. 497.

S. C. All the cases since *Tully v. Sparks*, 2 Raym. 546. have been determined against a contingent interest.

24. Where a meeting of creditors is properly advertised, and some do not think proper to attend, the majority in value who are present have a right to bind those who are absent.

20 Ap. 1741, cor. Hardw. C.
Cooper & al. v. Pepys & al.
1 Atk. 106, 107.

S. C. Where the drawer and indorser of notes are both become bankrupts, and the creditors have received a dividend of 6 *s.* under the commission against the indorser, they can only prove the remaining 14 *s.* under the commission against the drawer.

Ex parte Ryswicke, 2 P. Wms. 59.
Ex parte Lefebvre, 2 P. Wms. 407.

25. *A.* being entitled to 500 *l.* marries whilst an infant; the husband by deed after marriage agrees that the 500 *l.* shall be to her separate use for life, and after her death to the issue of the marriage. In the deed is a proviso, empowering the trustee to lend a part or the whole to the husband: he lent him the 500 *l.*, and in 14 months after he became

28 Feb. 1742, cor. Hardw. C.
Middlecome v. Marlow,
2 Atk. 519.

Lord H. said, this deed is not within the meaning of 13 Eliz. c. 5. for at the time of this settlement the husband had not a single creditor.

a bankrupt. The trustee brought his bill to be admitted a creditor. Lord Hardwicke decreed, *he should come in as a creditor under the commission for the money he paid to the husband.*

31 Mar. 1743, cor. Hardw. C.
Ex parte Desbarnes, 1 Atk. 103.

26. If a landlord of a bankrupt suffers the assignees to sell off his goods, he is not entitled to his whole rent, but must come in *pro rata* with other creditors under the commission.

29 Mar. 1743, cor. Hardw. C.
Ex parte Sandon, 1 Atk. 68.
Vide Ord. Cur. 8 May. 1794,
post, l. 14.

27. Commissioners have no power to admit separate creditors to prove debts under a joint commission, without the sanction of the court.

29 Mar. 1743, cor. Hardw. C.
Ex parte Bennet, 2 Atk. 528.

28. The reason why commissioners of bankrupts compute interest on debts no lower than the date of the commission is, because it is a dead fund. A salvage to each person is as much as can be expected upon a general loss in such a shipwreck.

4 Nov. 1743, cor. Hardw. C.
Bromley and others v. Gooders,
Assignee, 1 Atk. 75, 77, 80.

29. Where a bankrupt's estate is sufficient to pay all with a large surplus, creditors whose debts carry interest shall be allowed interest for their respective debts from the time the computation of it was stopped by the commissioners; but such as are creditors by bond, not beyond their penalties.

S. C. The proof of a debt before commissioners, unless an objection made in a reasonable time, is conclusive, and the bankrupt's representatives are bound by it.

S. C. Where there is mutual credit between a bankrupt and a creditor, the commissioners ought to stop interest on both sides at the time of the bankruptcy, or compute interest on both sides till the settling the account.

23 Dec. 1743, cor. Hardw. C.
Ex parte Walton & al.
1 Atk. 122, 124.

In bills of exchange there is a double contract; the first between the principal debtor and creditor; and also an implied contract that the principal debtor will indemnify the surety; so that if the creditor the indorsee comes upon the surety the indorser, the indorser or his assignees may come in against the original or principal debtor. So, where an indorser is barely a surety, and no consideration is paid by the original drawer.

30. *W.* draws bills of exchange on *H.*, who had no effects of *W.* in his hands. They are transmitted to *R.* and Co., and indorsed over by them to several persons. The assignees of *R.* and Co. admitted as creditors under *W.*'s commission, for so much as they have paid to the indorsers of *W.*'s bills of exchange under *R.* and Co.'s commission.

S. C. *A.* draws a bill on *B.*, who has effects of *A.*'s in his hands; afterwards it is negotiated and indorsed

indorsed over: this will not make the indorsers only in nature of sureties to A., but every indorser will be considered as a new original drawer.

31. Commissioners upon the day of choosing assignees are not to examine critically into the debt, but admit creditors for what they swear is due to them, as they are liable to an account afterwards.

A creditor by bond and an open account likewise shall be admitted to prove the bond, because the commissioners can still take the account; and upon a dividend he shall be entitled to no more than is due to him on balance.

A creditor in all cases of open accounts ought not to be excluded till the account is taken, because then the choice of assignees might arise from a *minor* part in value of the creditors, but still if commissioners have just grounds to doubt the debt, they do right to admit it only as a claim.

1 Aug. 1744, cor. Hardw. C.
Ex parte Simpson, 1 Atk. 62.

23 Dec. 1744.
S. C. 70.

32. J. G., previous to the marriage of the petitioner and his daughter, by bond became bound to the petitioner in 2000 l. conditioned as follows:—

“ That if the marriage took effect, and if the
“ heirs, &c. of J. G. should, at the expiration of
“ 12 months after the death of the survivor of the
“ said J. G. and B. his wife, pay unto the peti-
“ tioner, his executors, &c. 1000 l. And also
“ if the said J. G., his heirs, &c. should, until
“ the 1000 l. became due and was paid, pay unto
“ the petitioner, his executors, &c. interest for the
“ same at the rate of 4 l. per cent. half-yearly on
“ *Christmas* and *Midsummer* days in every year, the
“ first payment to be, &c. that then, &c.” By arti-
cles bearing even date with the bond, this money
was to be laid out at interest, and the interest to
be paid to the husband for life, then to the wife,
and then the principal to be divided amongst his
children as therein mentioned. J. G. the father
paid all the interest up to *Christmas* last; but none
of the payments were made precisely on the day
they became due, but some days after. Before
Midsummer, no interest being due on the bond, the
father became a bankrupt; and now the petitioner
prayed to be admitted a creditor under the com-
mission for the 1000 l. so secured. It was argued
for the assignees, that no action could be brought
on this bond at the time of the bankruptcy, and
therefore

20 Oct. 1744, cor. Hardw. C.
Ex parte Winchester, 9 Mod. 471.
Vide next case. *Ex parte*
Groome, 1 Atk. 115. deter-
mined differently by Lord H. on
same day under other considera-
tions.

In Tully and Sparks, 2 Raym. 1546, there were two contingencies; and as both had not happened at the time of the act of bankruptcy, it being uncertain whether the bond would ever become due or not, it was impossible to make such abatement of 5 per cent. as the act directs, and therefore cur. B. R. were of opinion the bond was not within stat. 7 Geo. 1.

therefore it was no debt; and that the interest accrued at *Midsummer*, since the bankruptcy could not entitle the petitioner to be let in. And that though an action lay at common law upon non-payment of the money at the day in the condition, even though it was paid at a day after, yet now by 4 and 5 Ann. c. 16. s. 12. money paid after the day might be pleaded in bar as well as at the day, provided it was paid before the action was brought: so that this case was within the act; and consequently as no action could be brought, no debt was due. But Lord *Hardwicke*, considering the act as applicable only to bonds payable at a certain day and place, and this a bond payable, as to the interest at several days, and as to the principal at a day future and uncertain, and therefore not within the words or intent of the act; and that the penalty might have been recovered at law before the bankruptcy; ordered the petitioner to be admitted a creditor for principal and interest, and the dividend he should receive to be laid out according to the articles: and said, this court will relieve the assignees only upon equity being done according to the condition.

20 Oct. 1744, cor. Hardw. C.
Ex parte Groome,
1 Atk. 115, 118, 119.

33. A husband by articles previous to marriage, covenants to leave his wife 600 *l.* in case she survives him; he becomes a bankrupt, and dies before any dividend made: the wife, as the law now stands, cannot be admitted a creditor under a commission against the husband.

A bond payable by instalments, the obligee upon a breach of payment of the first instalment gets judgment for the whole penalty. On payment of the money due and costs, even a court of law will act equitably, and relieve the obligor.

The case *Ex parte Caswell*, 2 P. Wms. 497. was an *obiter* opinion of Lord *King* only, and not the case in judgment.

A. a debtor to a bankrupt before his bankruptcy, and creditor to him upon a contingency that takes place after the bankruptcy, shall not be at liberty to set off under the clause relating to mutual credits.

Note; Lord *Hardwicke*, on hearing the petitions *Ex parte Winchester* and *Ex parte Groome*, said, these are cases of some value, more often of hardship and compassion. Many cases have arisen on this point. The two principal cases fall under very different considerations. In *Winchester's* case, the father gave a bond to the husband to pay him 1000 *l.* after the death of himself and wife, *with interest in the mean time*. How can the party be relieved against the penalty but by paying what is in conscience due out of the estate? In that case there was a breach of the condition before the bankruptcy, for the interest

interest was not paid, and the penalty was forfeited at law. In Groome's case, Lord H. was sorry to go upon niceties, but in that there was no remedy at law before the bankruptcy or commission, and therefore the petitioner could not be admitted a creditor. Lord H. added, that the case of Groome might have many hardships, but he could not, as the law stood, determine otherwise. His lordship hoped, however, that some gentlemen who heard him would think of a clause by way of amendment to the last bankrupt act, which might remedy and settle the points before his lordship for the future.

34. *Stephens*, formerly a trader in *Holland*, fails there, upon which there was a *cessio bonorum*: he comes to *England*, and is appointed a governor abroad: he applies to one *Burton* to be his security to the *African Company*, and to advance him a sum of money, who agreed to it, provided *Stephens* would give him a bond that should comprise the remainder of the old debt due before the *cessio bonorum*, as well as the further sum advanced, which was done accordingly. *Stephens* afterwards becomes a bankrupt, and the commissioners doubting if *Burton* ought to be admitted a creditor for the whole money, he now petitioned for that purpose. Lord Chancellor, on the circumstances of the case, was of opinion he was entitled to be admitted a creditor for the whole money upon his bond.

26 Oct. 1744, cor. Hardw. C.
Ex parte *Burton*, 1 Atk. 255, 6.

If a debtor cleared under the insolvent act afterwards gives a bond for the residue of the old debt, this will be binding upon him.

If a bankrupt after his discharge, gets future effects, in point of justice he ought to make good the deficiency, though no court will compel him.

Lord Chancellor seemed to think if a bankrupt, after his discharge, applies to an old creditor to lend him a new sum of money to carry on his trade, or to be his security for any office, this would be a good consideration for his giving bond for the remainder of the old debt, and the whole may be proved under a second commission.

The law of *Holland* with regard to a *cessio bonorum* follows the digest, and is no discharge of the effects, but only of the person.

Voet on the Pandect, tit. *Cessio Bonorum*, 2 tom. lib. 42. tit. 3.

35. *A.* entitled to navy bills in 1711, deposits them with Sir *Stephen Evans*, who gave a note to be accountable for them, and in six months afterwards becomes a bankrupt. The representative of *A.* petitioned to be admitted before the Master to prove both principal and interest to the time of the decree, as navy bills in their nature carry interest. Lord Chancellor held this to be a *special deposit*; and that a calculation should be made of the value of the whole entire thing deposited, both principal and interest, at the time of the deposit; and that interest ought

Oct. 1744, cor. Hardw. C.
Bromley v. Child, 1 Atk. 259.

ought not to run on as in the case of a simple debt.

22 Jan. 1745, cor. Hardw. C.
Ex parte Sandby, 1 Atk. 149.

Note; In the Chamber of London there is a rule by which the return of an apprentice fee, or the claim of the parent or guardian is apportioned in case of the death or insolvency of the master.

26 Oct. 1745, cor. Hardw. C.
Ex parte Kirk, 1 Atk. 108.

Lord Hardwicke compared this to the case of a bond assigned by a person before he becomes bankrupt, which is good in equity, and the assignee is entitled to retain the bond against the creditors under this commission.

4 June 1746, cor. Hardw. C.
Ex parte Botterell, 1 Atk. 109.
Lord H. thought this a hard case on the bankrupt.

4 June 1746, cor. Hardw. C.
Ex parte Thompson, 1 Atk. 125.

13 Aug. 1746, cor. Hardw. C.
Ex parte Marlar and others,
1 Atk. 150, 1.

At law interest is given as damages only by a jury where not expressed in the body of a note, and commissioners cannot award damages.

Vide also *Ex parte Bennet*,
2 Atk. 528.

36. An apprentice (where his master has received an apprentice fee with him, and afterwards becomes bankrupt) shall be admitted as a creditor only upon the remaining sum, after deducting for the time he lived with the bankrupt.

37. B., a creditor under a commission, being indebted to H. in 79*l.* draws on the assignees for that sum, payable to H. or order, out of B.'s share of the dividend to be made. The assignee accepts it by parol, but before any dividend becomes a bankrupt himself. H. is entitled to the whole 79*l.*, and is not obliged to come in *pro rata* only under the commission against the assignee.

38. Where a bankrupt is in execution for one debt, and the judgment-creditor has another against him of a distinct nature, he may prove *this* under the commission, notwithstanding he refuses to waive his execution upon the other.

39. A. without consideration gave a note, payable to B. two months from the date, for 100*l.* B. indorses it over to C., but allows a discount of 1*l.* 11*s.* 6*d.*, being at the rate of 9 per cent. When the note became due, C. took a joint bond from A. and B. for the 100*l.* (though he paid only 98*l.* 8*s.* 6*d.*) which he proved under a commission of bankrupt against A.; but the commissioners, finding out this fact afterwards, stopped his dividend. Lord Chancellor rejected C.'s petition to have his dividend paid him, and ordered an issue to try whether the bond from the drawer and indorser to C. for 100*l.*, paying only 98*l.* 8*s.* 6*d.*, was usurious.

40. A person who takes no more for the discount of notes than at the rate of 5*l.* per cent. per ann. shall prove the whole amount of those notes under a commission of bankruptcy against the drawer without being obliged to deduct what he received of the indorser for the discount.

S. C. The rule established by commissioners of bankrupts, that *note* creditors cannot prove interest upon them unless expressed in the body thereof is a reasonable one, and the court will not break through it.

41. Commission against *A.* who owed *B.* twelve years rent. *B.* proves his debt under the commission. The assignees sell the whole goods of *A.* to the petitioner, who lives in *A.*'s house. *B.*, three years after proving his debt, distrains upon these goods as being still upon the premises. The vendee of the goods is entitled to them, and the proceedings of *B.* upon his replevin restrained and confined to his remedy under the commission.

11 April 1747, cor. Hardw. C.
Ex parte Groves, 1 Atk. 104.
Came on again 8 May 1747.

Notwithstanding a commission, and a messenger is in possession of the goods, the landlord may distrain for rent, even after an assignment, if the goods are on the premises.

42. Upon an affidavit of a creditor that he has not read the Gazette, he will be admitted to prove his debt, so as not to disturb a former dividend; nor can commissioners proceed to make a second till he is brought up equal to the creditors under the first dividend.

2 Feb. 1748, cor. Hardw. C.
Ex parte Stiles and another,
1 Atk. 209.

43. Equitable demands may be proved under a commission, though equitable creditors cannot take it out.

25 Mar. 1750, cor. Hardw. C.
Ex parte Williamson, 1 Atk. 82.
2 Ves. 249.

A trader in *Ireland*, &c. contracting debts in *England*, and coming over, a commission of bankruptcy may be taken out, but with liberty for creditors in *Ireland* to come and prove debts.

Vide Bird and Sedgwick,
1 Saik. 110. *Et vide S. C.*
ante, sec. 2. pl. 9, w.

44. An obligee may have several actions against each obligor, but shall not levy more than one satisfaction for his debt. And a creditor is entitled to come under a commission of bankruptcy against all the obligors, drawers of notes, &c. till he is completely satisfied.

20 Dec. 1750, cor. Hardw. C.
Ex parte Wildman, 1 Atk. 110.
Vide Ex parte Lefebvre, ante.
Ex parte Ryfwicke, ante, and the cases there referred to on S. P.

S. C. The petition was admitted under the commission for his whole debt, and before a dividend receives 2s. 6d. in the pound under a composition of the acceptors of the bills. The assignees insist he shall be paid a dividend on the sum left only, after deducting the 2s. 6d.; but as the composition was not paid till after the debt proved, he shall receive a dividend on the whole sum.

45. *Cuff* had for several years been collector of the land-tax for the parish of *D.*, and at the issuing of the commission owed upon the balance 928*l.* 11*s.* to the Chamber of *London*. An inhabitant of the parish admitted a creditor by Lord Chancellor, and allowed to prove for himself and the rest of the parishioners.

28 Mar. 1751, cor. Hardw. C.
Ex parte Child, 1 Atk. 111.

28 Mar. 1751, cor. Hardw. C.
Ex parte Marshall and others,
 1 Atk. 262.

46. An extent of the crown is taken out against the surety of a bankrupt, who pays the debt after disputing it some time, and being put to an expence thereby, he shall, notwithstanding he disputed the payment of a just debt, be admitted to prove the expences of such suit under the commission against the principal.

2 Dec. 1751, cor. Hardw. C.
Ex parte Elizabeth Mitchell,
 1 Atk. 120, 121.

Ex parte Caswell, 2 P. Wms. 497.
Ex parte Greenaway, 1 Atk. 113.

Lord Hardwicke said, that his opinion *casu ex parte Groome* was founded on Tully and Sparks in B. R. and that the only difference between the principal case and *Ex parte Groome*, was that Groome's case was on contract, and this upon bond.

47. *B. M.*, in pursuance of articles before marriage with the petitioner, executed a bond to *T. M.* and *W. R.*, trustees under the articles in the penalty of 1000*l.*, conditioned to be void if the heirs, &c. of *B. M.* should pay to *T. M.* and *W. R.* 500*l.* within three months next after the death of *B. M.* for the use of the petitioner; or in case she should not survive, to the use of her child or children, if any. A commission of bankruptcy issued against *B. M.*, who dies on the 1st April 1749. On the 28th of the same month a dividend is made of 9*s.* in the pound; the petitioner prayed to be paid a proportionable dividend. The assignees being served with notice, and *no counsel attending for them*, the court directed she should be admitted a creditor, and receive a dividend of 9*s.* in the pound, *not being opposed*.

A judgment would have made it an immediate debt, and she would have been entitled to have come in as a claimant before her husband's death, and assignees must then have retained sufficient on a dividend-day to answer a proportionable dividend to the petitioner when the event happened.

Lord Chancellor King's being an *obiter* opinion as to a *wife's being admitted to a dividend*, and Lord Talbot doubting of it, and the present Chancellor, in a case *Ex parte Groome*, December 1741, refusing to admit such a person creditor, his lordship would not suffer the secretary to draw up the order pronounced at a former day of petitions, though not defended, but recommended it to the assignees to compromise it with the petitioner.

21 Dec. 1752, cor. Hardw. C.
Ex parte Marshall and others,
 1 Atk. 129, 130.

This equity of the surety to stand in the place of the principal creditor is so far qualified, that he is not entitled to a dividend from the bankrupt's fund to the prejudice of any other debt the principal creditor may have against the bankrupt's estate. *Ex parte Turner*, 3 Vef. jun. 243.

48. *G.* drew a great number of bills payable to *V.* and *A.* upon *H.*, who had no effects of *G.*'s in his hands, but accepted them for the honour of the drawer. *G.* becomes a bankrupt, and *H.*, by means of the great sums he paid on account of such acceptance, becomes a bankrupt likewise. The bill-holders prove under both commissions, and receive dividends, but not sufficient to pay 20*s.* in the pound. The assignees of *H.* petition to stand in the place of the bill-holders, *pro tanto*, as
 the

they had received under *H.*'s commission against the estate of *G.* Ordered that they should *pro tanto*, as *H.*'s estate had paid on account of his acceptance of the said bills; but not to receive any dividend from *G.*'s estate till the *bill-holders* had received a full satisfaction for their debts.

S. C. W. of *Bristol* had large dealings with *G.* of *Worcester*, who had *H.* for his correspondent in *London*. It was agreed between *G.* and *H.* that the latter should answer all drafts that *W.* should draw upon him on account of *G.* *W.* draws accordingly on *H.* for 4000*l.*, who accepts it, *though he had no effects of G.'s in his hands*. The payee on the acceptor's non-payment applies to the drawer, who pays it. *W.* applies to be admitted a creditor under a commission of bankruptcy against *H.* The agreement between *G.* and *H.* puts the latter to all intents in the same situation as *G.* himself; and therefore, *though he had no effects of G.'s in his hands at the time*, he has by his agreement made himself liable, and *W.* has a right to come in as a creditor under the commission against *H.*

21 June 1753.
S. C. 134.

49. Costs accrued by protesting bills before a commission issues may be proved, but no parts of the costs arisen afterwards.

10 Aug. 1754, cor. Hardw. C.
Anon. 1 Atk. 140.
Vide Green, 150. (n.)
2 Blackst. Rep. 1317.

50. A person who repairs a ship has no specific lien, if delivered to the bankrupt; if repaired in a foreign port whilst out upon a voyage, it would have been otherwise. Directed to prove the debt for repairs under the commission.

10 Aug. 1754, cor. Hardw. C.
Ex parte Shank and others,
1 Atk. 234.
Note; *Stevens v. Sole*, cor.
Talb. C. cited in *Ryal v. Rolle*,
1 Atk. 170.

51. In *March* a commission of bankrupt issued against *Matthews*, he being then indebted to *Ockenden* in 28*6l.* 7*s.* 10*d.* for grinding corn. *O.* had in his possession thirty-six loads and three bushels of wheat belonging to the bankrupt, part ground and part grinding, besides a great number of sacks. 16*l.* 5*s.* was due to him for grinding the corn, which was in his hands at the time *M.* became bankrupt. The wheat was sold by the assignees by agreement between them and *O.*, without prejudice to his claim, who applied by petition to be paid his whole debt out of the money arising by the sale. *Per cur.*—*O.* had no specific lien upon the corn and sacks, but a particular one only *pro tanto* as is due for grinding the corn in his hands, and the wheat belonged to the assignees.

12 Aug. 1754, cor. Hardw. C.
Ex parte Ockenden,
1 Atk. 235, 6, 7.

Vide Blackstone's Reports, 653.

S. C.

Vide Demaindary v. Metcalfe,
Prec. in Ch. 419.

Vide Downman v. Matthews,
Prec. in Ch. 580. Ex parte
Deeze, 1 Atk. 228.

5 Geo. 2.

2 Nov. 1754, cor. Hardw. C.
Ex parte Peachy, 1 Atk. 111.
This appears to be the petition
of a landlord who had levied all
he could by distress.

3 July 1755, cor. Hardw. C.
Ex parte Macklin, 2 Ves. 675.

6 July 1768, cor. Camden, C.
Francis v. Rucker & al.
Amb. 672.
Vide Ex parte Todd, 3 Wils.
270. Macarty v. Barrow,
2 Stra. 949. But better reported
3 Wils. 17.

P. 1783, cor. Lds. Comrs.
Ex parte Crinford,
1 Bro. Ch. Ca. 270.
Vide Ex parte Botterell, 1 Atk.
309. Ex parte Ward, 1 Atk.
353.

T. 1784, cor. Thurlow, C.
Kissner v. Rayner,
1 Bro. Ch. Ca. 384.

S. C. Where *A.* borrows a sum of money on the pawn of jewels, and furnishes sums afterwards on his note, the executor of *A.* shall not redeem the jewels without paying the money due on the notes.

The case between clothiers and dyers, and clothiers and packers, are different from the present, it being always customary for them to make up their accounts by giving mutual credit; the dyer for his work, and the clothier for his cloth.

Courts of equity go no farther than courts of law in the cases of a set-off upon the act relating to mutual credit.

52. Where a person stays till a bankrupt and the assignees are dead, and fifteen years after the date of the commission applies to be admitted a creditor, the court on these circumstances, and in consideration of the length of time, will dismiss the petition.

53. A father receives his child's earnings on the theatre whilst living with him, and afterwards becomes a bankrupt. The child by agreement admitted a creditor for a particular sum to avoid an inquiry; but dangerous to lay down such as a general rule.

54. Bills drawn by a merchant in *Pennsylvania* on a correspondent in *England* who becomes bankrupt. Several of the bills were accepted before the commission, but protested for non-payment, being due after the commission. By the law of *Pennsylvania*, in case of such a protest on bills drawn on any person within the province, the drawer shall pay the bill, and 20 *per cent.* for damage. The plaintiff, who was the drawer, having paid or being liable to pay the bills, and the 20 *per cent.* to the holders, was held entitled to prove the 20 *per cent.* as well as the bills under the commission.

55. Where a party has clearly distinct demands on a bankrupt, he may sue for one and come under the commission for the other; but not if they are only different securities for the same debt.

56. A father tenant for life of a settled estate, remainder to the son in tail. The son joins the father in a recovery and mortgage. The father became

became bankrupt, and the mortgaged premises were sold. The son brought his bill to be enabled to prove under his father's commission, his proportion of the money raised by sale of the settled estate. Lord Chancellor could not distinguish this from the common case of *A.*'s joining in a bond, or giving a collateral security for the debt of *B.*; in which case the security cannot prove unless he had been called upon for the money *previous to the bankruptcy*. His lordship could not distinguish between the pledge of a man's estate and his person. Bill dismissed, but without costs.

57. Covenant in a bankrupt's marriage-settlement to pay to the trustees 6000*l.* by instalments, viz. 1000*l.* at the end of seven years, and 1000*l.* *per ann.* afterwards, unless the bankrupt should die, and then the whole to be paid in one year after his death, if his wife or any child should be living; if not, only 3000*l.* to be paid. The husband took a life-estate in several annuities belonging to the wife, and became bankrupt in the seventh year. On a petition to prove the 6000*l.* under the husband's commission, Lord Chancellor doubted if there were not mutual demands between the husband and the trustees. As to the 3000*l.* that would certainly become due, the only contingency was, if there would not be 3000*l.* more. Trustees admitted to prove 3000*l.*, and the assignees at liberty to claim what the husband could claim against the trustees, so that there must be a rebate on the value of those funds.

58. Debts upon the insurance of ships are only proveable against the separate estate of the partner who signs the policy, the insurance by a partnership being against 6 *Geo.* 1. c. 18.

59. Costs arising from the protest of bills of exchange shall be proved, under a commission of bankruptcy, only when incurred antecedent to the act of bankruptcy, (where the date of such act is ascertained,) not to the issuing of the commission.

60. Where an executor is a bankrupt, and the money of his testator comes to the hands of his assignees, he shall be admitted a creditor for that money under his own commission, but the dividends shall be paid into the bank, with the privacy

T. 1784, cor. Thurlow, C.
Ex parte Misford,
1 Bro. Ch. Ca. 398.

11 Aug. 1784, cor. Thurlow, C.
Ex parte Angerstein, *Ex parte*
Lee, 1 Bro. Ch. Ca. 399, 400.

P. 1789, cor. Thurlow, C.
Ex parte Moore,
2 Bro. Ch. Ca. 597.

P. 1789, cor. Thurlow, C.
Ex parte Leeke,
2 Bro. Ch. Ca. 596.
Note; It is not incongruous
that a bankrupt executor shall
prove against his own estate, for

he claims in *auter droit*, and the like order was made *Ex parte Brooks*, 1 June 1793. Lord Chancellor said, if the property had been considerable he would not proceed without a bill, as in *Case Ex parte Markland*, 2 P. Wms. 546. where Lord King denied relief on a petition, and ordered the parties to bring their bill.

T. 1789, cor. Thurlow, C.
Ex parte English,
2 Bro. Ch. Ca. 610.
Vide Ex parte Simpson, 1 Atk.
71. *Ex parte Wood*, 1 Atk. 222.

61. Testator, uncle to the bankrupt, forgave him a debt of 1000 *l.*, on condition he should pay his sister 60 *l.* a year; if he failed in punctual payment, his executrix to call in his money; this is a debt proveable under the commission.

T. 1789, cor. Thurlow, C.
Ex parte Hanson,
2 Bro. Ch. Ca. 615.

62. An engagement, otherwise than by indorsement, to warrant the payment of a bill of exchange, which does not become due till after the bankruptcy, will not enable the holder to prove it under a commission of bankruptcy, because it is contingent.

M. 1789, cor. Thurlow, C.
Ex parte Smith,
3 Bro. Ch. Ca. 1.

63. Where the indorser of a bill of exchange becomes bankrupt, and the holder proves his bill under the commission, and afterwards compounds it and discharges the acceptor, without notice to the assignees of the indorser, he also discharges the indorser's estate, and the proof of his debt must be expunged.

M. 1789, cor. Thurlow, C.
Ex parte Smith,
3 Bro. Ch. Ca. 46.

64. A creditor who had obtained goods of his debtor just before his bankruptcy, shall not prove for the residue of his debt without accounting for the goods so obtained, and his share of the dividend may be retained until he gives up the property so unduly possessed.

M. 1789, cor. Thurlow, C.
Ex parte Simpson,
3 Bro. Ch. Ca. 46.
Vide Lewis v. Piercey, Term
Rep. C. B. 29.

65. A creditor was admitted to prove his costs taxed after commission, on a verdict obtained before, the costs having relation back to the verdict, and consequently the bankrupt's certificate will be a good bar.

M. 1789, cor. Thurlow, C.
Ex parte Congalton,
3 Bro. Ch. Ca. 47.
Vide Hawkins v. Pensfold,
2 Vef. 550.

66. A creditor of the bankrupt borrows some money of him, which he repays with interest, after a secret act of bankruptcy, the loan repaid considered as never borrowed, and the creditor shall prove his whole debt.

H. 1791, cor. Thurlow, C.
Ex parte Shakeshaft,
3 Bro. Ch. Ca. 197.

67. K. and S. being trustees of money in the funds, sell it for the benefit of S., who dies insolvent. K. becomes bankrupt; the person interested in the funds may prove against the estate of K. the

K. the value of the funds at the time of the bankruptcy; though S.'s estate is first liable.

S. C. Where the bankrupt and another are executors of a creditor of the bankrupt, the court will permit the other executor to prove the debt.

S. C. on another petition.

68. The pledgee of a bill of exchange (though for part only) may prove the whole amount.

P. 1791, cor. Thurlow, C.

Ex parte Croftley,

3 Bro. Ch. Ca. 237.

Vide Ex parte King, 1 Cooke's Bahkr. Laws, 157. 4th ed.

69. Two assignees of a bankrupt, one solvent, the other a bankrupt, as a copartner in an insolvent house, to which he had advanced the money he had as assignee; the solvent assignee cannot prove this under the joint commission, there being no contract with him and the copartnership.

T. 1791, cor. Thurlow, C.

Ex parte Apsey,

3 Bro. Ch. Ca. 265.

Vide Ex parte Clowes, 2 Bro. Ch. Ca. 595. in which case the partners had agreed to consolidate the separate debts.

70. Bankers receive and pay money on account of a bankrupt, after notice of an act of bankruptcy, all the sums received are so received to the use of the estate, and they cannot set off the payments made, or be allowed to come in as creditors, and claim dividends on debts paid, which were owing before the act of bankruptcy.

T. 1791, cor. Thurlow, C.

Hankey & al. v. Vernon & al.

3 Bro. Ch. Ca. 313.

2 Term Rep. 113.

71. Bond by a trader to indemnify another who has been surety for him; if the surety pays part before the bankruptcy, and other part afterwards, the whole is proveable under his commission, if the bond was forfeited before the bankruptcy.

H. 1792, cor. Thurlow, C.

Ex parte Cockbott,

3 Bro. Ch. Ca. 502.

Bond to replace stock by a given day, if forfeited before the bankruptcy, is proveable. *Vide Ex parte Leitch, 22 Dec. 1792.*

72. Interest allowed to be proved on the bankrupt's note to bankers, not reserving interest, there being a surplus of the bankrupt's estate after payment of 20s. in the pound.

H. 1792, cor. Thurlow, C.

Ex parte Hunkey,

3 Bro. Ch. Ca. 504.

Vide Ex parte Champion, 3 Bro. Ch. Ca. 436. which with the principal case were confirmed on rehearing. Vide post, f. 19.

73. Petition to prove a debt in bankruptcy irregular, because the creditor did not go before the commissioners till after it was presented, and because it was brought to a hearing without stating what passed before them.

21 Dec. 1792, cor. Lds. Comrs.

Ex parte Wright, 2 Vef. jun. 41.

74. A surety admitted under the bankruptcy of his principal, as to all recovered against him, and his costs, there being a surplus.

23 Dec. 1793, cor. Loughb. C.

Ex parte Mills, 2 Vef. jun. 302.

Vide Bromley v. Child, 1 Atk. 259.

75. Ordered, that upon application to the commissioners by any person claiming to be a mortgagee of any part of a bankrupt's estate, the commissioners shall inquire whether such person is a mortgagee, and for what consideration, and under

Ordo Curie, 8 Mar. 1794,

per Loughborough, C.

4 Bro. Ch. Ca. 548.

what circumstances, and if the commissioners shall find such person is a mortgagee, and no sufficient objection shall appear to the title of such mortgagee, or to the sum claimed under the mortgage, the commissioners do proceed to take an account of the principal, interest, and costs due thereon, and of the rents and profits of the mortgaged premises received by the mortgagee, or by his order, if he shall have been in possession; and that the commissioners do give due notice in the *London Gazette*, and other public papers, when and where said mortgaged premises are to be sold before them, or by public auction, at any place they may think fit; and that all proper parties do join in a conveyance to the purchaser as the commissioners shall direct; and that the monies to arise from such sale be applied first to defray the expences of the sale, and then to the satisfaction of the mortgagee's principal, interest, and costs; and that the surplus (if any) be paid to the assignees of the bankrupt. But if the monies arising from the sale be insufficient to satisfy the mortgagee's demand, then that such mortgagee be admitted a creditor on the bankrupt's estate for the deficiency, and received a dividend *pro rata* with the other creditors, but so as not to disturb any dividend then already made; and for the better making such inquiry and taking such account, and making a title to a purchaser, that all parties be examined by the commissioners on interrogatories or otherwise, and do produce before them on oath all deeds, papers, and writings in their custody belonging to the bankrupt, as the commissioners shall direct.

T. 1796, cor. Loughb. C.
Ex parte Turner, 1 Ves. jun. 243.

76. Accommodation bills upon the bankruptcy of the drawer were fully paid by the acceptors to the holder, who, having a farther demand under the commission, proved for the whole, including the bills; he may take out of the dividend upon the bills the proportion he would have received upon the residue of his debt beyond the bills, if the debt for the bills had been expunged; the rest of the dividend on the bills belongs to the acceptor.

4 Feb. 1797, cor. Loughb. C.
Ex parte Hall, 3 Ves. jun. 304.

77. Acceptor becoming bankrupt, the petitioner having indorsed before the bankruptcy, took up the bill; he may prove the bill he took up, but cannot set off a debt due from him to the estate, *viz.* his own acceptance for 90% in the hands of the bankrupt.

79. A

78. A person giving cash for a bill without the indorsement of the person from whom he takes it, cannot prove it under his bankruptcy.

13 May 1797, cor. Loughb. C.
Ex parte Shuttleworth,
3 Ves. jun. 968.
Vide Ex parte Whitter, in
re Jeffery, 6 Feb. 1790.

79. Bill indorsed to a broker in consideration of money paid by him in effecting insurances; one of which was illegal: the acceptor becoming bankrupt, the petition of the indorsee to prove was dismissed as to what arose upon the illegal insurance; and the bankruptcy being some years ago, an inquiry was directed as to the rest.

20 May 1797, cor. Loughb. C.
Ex parte Maiber, 3 Ves. jun. 173.
Though equity, on a usurious contract, will not make void the whole debt, but make the party pay what is really due, the assignees of a bankrupt have a right to insist that the whole is void; and unless the assignees and creditors submit to pay what

is really due, the Lord Chancellor has not power to order it. Applications of this nature have been frequently refused. *Vide Ex parte Skip*, 2 Ves. 489. Cooke's B. L. 4 ed. 185, 186.

Sec. 6. Of the Assignees; their Power and Duty: And, herein, of their Liability in Cases of Neglect, Default, or Mismanagement.

1. **A**N award is made in an adversary suit between *A.* and *B.*, and confirmed by the court, *A.* being then a bankrupt, but not known to be so. A commission is afterwards sued out. This award shall bind the assignees under the commission.

P. 1691, Canc.
Whitacre v. Pasolin, 2 Vern. 229.
Submission to an award held not to be avoided by a secret act of bankruptcy. Cooke's B. L. 584. 4 ed.

2. *J. S.* had diamonds consigned to him by Governor *Pitt* to sell for his use; he charged them fraudulently at a less price than he sold them for, and after became a bankrupt. Upon which a question arose, whether the assignees under the commission should pay costs; and resolved they should out of the estate; for if the bankrupt had been here himself he must have paid costs, and the assignees stand in his place as to his estate.

T. 1725, cor. Lds. Comrs.
Cbild v. Pitt, Sel. Ca. in Ch. 16.
2 Eq. Abr. 100. pl. 4.
Note; It appearing that the paper in which the bankrupt charged the diamonds at a less value was not delivered to Mr. Pitt, it was looked upon not as an actual fraud but only a preparation for it, of which he might have repented, so no costs against the assignees.

3. The assignees are bound by all acts done by the bankrupt before he became so, whether of a legal or equitable nature, if they were done upon a valuable consideration and without fraud; and whatever disposition of his estate he makes that will affect himself, does equally conclude the assignees who stand directly in his place.

T. 1725, Canc.
Anon. 2 Eq. Abr. 101. pl. 5.
Vide Rex v. Lacy, in Seacc. Bunb. 337. Et vide — v. Du Rhone, Sel. Ca. in Ch. 77. where it is clearly laid down as law that assignees are exactly in the same place as the bankrupt in every particular.

4. The clerk to a commission may be discharged by the assignees, for they are trustees for the creditors, and may employ whom they please; and therefore the former clerk was ordered to deliver up all papers on being paid his bill.

23 Dec. 1728, cor. King, C.
Anon. 7 Vin. Abr. 117. pl. 2.
2 Eq. Abr. 103. pl. 4.

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M. 1728, cor. King, C.
Anon. Mos. 36.

Vide 2 Vern. 504. 515. 570.
1 Salk. 318. 1 Vern. 303.
1 Ch. Ca. 127. Wentw. Off.
Ex. 161. Suppl. to Wentw.
316. 328. Clayt. Rep. 106. ca. 179. Keilw. 51. Swinb. pt. 1. sec. 7. (n. 3.) Keilw. 23.
31 Hen. 6. 38. Dy. 2. ca. 10.

T. 1729, cor. King, C.
Ex parte Markland,
2 P. Wms. 546.

2 Eq. Abr. 101. pl. 6. 162. pl. 18.
Note; It was said in argument, and admitted by the court, that the order for the administratrix to account before the commissioners would be of no use, since the creditors might notwithstanding bring their action or bill against the administratrix.

Vide Ex parte Leeke, ante, l. 5.
pl. 60. and 2 Bro. Ch. Ca. 596.

M. 1732, cor. King, C.
South-Sea Company v. Wyndesill,
3 P. Wms. 144.

2 Eq. Abr. 74. pl. 28. 101. pl. 7.
So in this case the statute was held pleadable against the South-Sea Company, who stood in the place of the late directors.

23 Dec 1737, cor. Hardw. C.
In re E. of Litchfield and another, Assignees, 1 Atk. 87, 88.

1737, cor. Hardw. C.
Warner and others, Executors, &c. v. Watkins and another, Assignees, &c. 2 Atk. 7.

30 Nov. 1739, cor. M. R.
Anon. 1 Atk. 88, 89.

* Because there is no privity between them and the bankrupt, or at least but an artificial one; and yet, if a supplemental bill were not allowed, the costs of the former suit would be absolutely thrown away.

3. An assignee is answerable only for what he receives.

S. C. But if one assignee pays money to the other, he is still chargeable by the creditors.

6. Assignee under a commission of bankrupt dies very much indebted by bond, &c. and the creditors of the bankrupt petitioned that the administrators of the assignee might account before the commissioners, he having some of the bankrupt's effects in specie in his hands; but the administrator denying this upon oath, and swearing that there were debts by specialty beyond the assets, the court thought this proper for a bill, and not for a summary way of accounting before commissioners.

7. Though the assignee of the effects of a bankrupt claims under an act of parliament, yet, as the statute of limitations might be pleaded against the bankrupt, by the same reason it is pleadable against such assignee.

8. The rule, that trustees or assignees shall not be accountable for losses which happen from necessary acts done, does not extend to their agents.

S. C. If an assignee under a commission of bankrupt employs an agent to receive money and he embezzles it, the assignee will be liable to make it good to the creditors, unless he consulted the body of the creditors in the appointment of the agent.

S. C. All the court can do, in a summary way under a commission of bankruptcy, is in transactions between the creditors and assignees; but the court will not on petition determine on private agreements between assignees independent of the creditors.

9. An assignee of a bankrupt cannot compound a debt without a previous meeting of the creditors for their concurrence, convened by advertisement in the *Gazette*.

10. Where the assignees of a bankrupt die, or are discharged, and others are chosen in their room, they cannot revive *, but must bring a supplemental bill to entitle themselves to the benefit of proceedings in a former suit.

11. Where an assignee dies before he has accounted for what he had received, and leaves no personal assets, the creditors have a lien upon his real estates.

S. G. Assignees are mere trustees, and each separately answerable only for what they receive. verally bound; and Lord Hardwicke recommended inserting the words jointly and severally in all future assignments.

12. Commissioners of bankruptcy appoint a dividend to be made of the bankrupt's estate. A creditor under the commission neglects to receive of the assignees his proportion of that dividend; the assignees afterwards break and run away with the dividend that was in their hands. The creditor shall not be allowed to come upon the bankrupt's estate for that money, but must take his remedy against the assignees as well as he can. Cited per Lord Chancellor as a case that had been put in the case of *Smith and Duke of Chandos*.

to have taken his remedy against the assignees.

24 Dec. 1739, cor. Hardw. C. *Primrose v. Bromley, Executor*, 1 Atk. 89.

The words of the assignment, to account for such money as they or either of them shall receive, must be so construed as that the assignees may be jointly and severally in all future assignments.

H. 1740, cor. Hardw. C. Cited in *Smith v. Duke of Chandos*, Barnard. 419.

2 Eq. Abr. 106, pl. 8.

2 Atk. 159. S. C. but not S. P. This case wholly depends upon the deed of distribution made by the commissioners ascertaining the dividend; for if no deed of distribution had been made, the creditor would have been allowed to have come upon the bankrupt's estate, and would not have been confined to the assignees. Per Lord Chan. S. C.

13. A question arising, whether an assignment of a term by a bankrupt was to be considered as an absolute sale, or by way of mortgage only. At a meeting of the bankrupt's creditors the matter under consideration was, whether the assignees should bring a bill in order to be let into a redemption of this leasehold estate or not, and the majority of the creditors were against such bill. The assignees thereupon could not bring it, being disabled by the 5 Geo. 2. c. 30. s. 38.; whereupon the rest of the creditors who were for the bill brought a bill in their own names against the supposed mortgagee, and also against the commissioners and assignees, praying to be let into the redemption of this leasehold estate. The assignees by their answer said, that they were desirous it should be redeemed; but the supposed mortgagee opposed it, and insisted that it was an absolute purchase. The question now was, Whether this bill was well brought? Per curiam.—It was; and that if the assignees refuse to bring a bill that is for the benefit of the bankrupt's estate, any creditor has a right to bring such bill under peril of costs; and decreed, that the assignees in the first place shall have liberty to redeem, and in default thereof that the plaintiffs shall have this redemption.

P. 1740, cor. Parker, J. abf. C. *Franklyn v. Fern*, Barnard. 30. 33.

2 Eq. Abr. 102, pl. 10.

Vide *Bickley v. Dorrington*, *Monk v. Pomfret*, in which cases it is laid down as a rule that no person shall be allowed to come into equity for a redemption but he that hath the legal estate of the mortgagor.

Where there are proper persons, as executors or assignees, to get in the estate of another, equity will not suffer creditors to bring a bill, unless such executors or assignees collude with the debtor, then they may bring a bill and charge the collusion. Per Parker, C. J.

14. Where a meeting of creditors is properly advertised, and some do not think proper to attend, the majority in value who are present, have a right to bind those who are absent.

20 Ap. 1741, cor. Hardw. C. *Cooper & al. v. Papps & al.*, 2 Atk. 106, 107.

Ex parte Kyfowicko, 2 P. Wms. 89.
Ex parte Lefebvre, 2 P. Wms. 407.

8. C. Where the drawer and indorser of notes are both become bankrupts, and the creditors have received a dividend of 6s. under the commission against the indorser, they can only prove the remaining 14s. under the commission against the drawer.

22 Oct. 1741, cor. Hardw. C.

Ex parte Lane, 1 Atk. 90.

In this case the assignees had neglected to make a dividend for nine years, and the court only charged them with interest at 4 per cent. per ann.

Vide Treves and Townsend, 1 Bro. Ch. Ca. 384. *Hilliard's case*, 1 Ves. jun. 89. *Hankey and Garratt*, 3 Bro. Ch. Ca. 460. S. P.

15. Where assignees do not divide a bankrupt's effects in proper time, but are making a private advantage to themselves, the court will charge them with interest.

28 Nov. 1741, cor. Hardw. C.

Philpot v. Hoare, Amb. 480.

Vide Treackle v. Coke,

1 Vern. 165.

16. Covenant by lessee for years, that he, his executors or administrators, should not assign without consent in writing: he becomes bankrupt. Held, the covenant does not bind the assignees under the commission in case they make a fair assignment, but does if they do not make a fair one. In this case the assignment was fraudulent, and held the assignee under the commission continued liable to the rent after he had assigned.

31 Mar. 1742, cor. Hardw. C.

Ex parte Ellis and others,

1 Atk. 101.

Lord Hardwicke admitted that the bankrupt acted in *auter droit*, and that his bankruptcy did not take away his right of executorship; but his lordship thought he ought to secure the effects of the testator by appointing a receiver.

17. Where assignees have possessed themselves of effects which belonged to the bankrupt as an executor only, the court, upon an application of the testator's creditors, will, for the securing his effects, appoint a receiver, to whom the assignees shall account for so much as they have got in of the testator's estate.

Vide ante, f. 5. pl. 60.

1 Ap. 1742, cor. Hardw. C.

Ex parte White, 1 Atk. 90.

18. An assignee cannot stop a person's share in a dividend on account of his own private debt owing to him from that person.

22 June 1742, cor. Hardw. C.

Ex parte Turner, 1 Atk. 148.

Lord Hardwicke said, the clauses in the statute relating to this matter are very darkly and obscurely penned, arising chiefly from the words *forty-two days* being thrown into the latter clause.

Vide Green, 221. 2 Burr. 1124-5. 2 Blackst. Rep. 1188.

19. The attendance of the bankrupt on the assignees to assist them in making out the accounts of his estate is confined by 5 Geo. 2. to the forty-two days, or the enlarged time at most; but if the assignees will undertake for the creditors who had proved their debts under the commission, that they shall not arrest him, the court will order him to attend, notwithstanding any risk he may run from the creditors at large.

13 Aug. 1742, cor. Hardw. C.

Ex parte Whitechurch, 1 Atk. 91.

Vide 5 Geo. 2. c. 30. f. 34, 35-38.

20. Creditors cannot give a general power to assignees to prosecute suits, or submit matters to arbitration at their own discretion; but there must be a distinct meeting of creditors upon a notice given

§ 6. Assignees' Power and Duty.

given in the *London Gazette* to consider of each particular suit or case for arbitration.

21. Assignees may advertise a meeting upon any extraordinary occasion that concerns the creditors, as well as for the particular purposes directed by the acts of parliament, and are much to be commended when they so do.

22. Where by acts before marriage the husband made himself in the nature of a trustee for the wife, his assignees must be so too of course.

23. Commissioners upon the day of choosing assignees are not to examine critically into the debt, but admit creditors for what they swear is due to them, as they are liable to an account afterwards.

24. The court will not set aside the choice of assignees; because some of the creditors live beyond sea, and had no opportunity of voting.

Assignees ought not to be removed unless it is shewn that they are not persons of substance or integrity.

No precedent to be found of an order for creditors to proceed to a second choice of assignees upon a bare suggestion that some live remote from London, or are out of England.

25. Assignees stand in the place of a bankrupt, and are bound by all acts fairly done by him.

26. An assignee under a commission of bankruptcy must surrender a copyhold to a purchaser notwithstanding the lord may exact two fines; for no person can make a common law conveyance of a copyhold.

An assignee under a commission of bankruptcy of a copyhold estate is a vendee within the statute of 13 *Eliz. c. 7.* and not the purchaser from the assignee of such estate.

27. Assignees under commission of bankruptcy take subject to all equitable liens against the bankrupt himself.

28. Where an assignee becomes a bankrupt and is removed, his assignees as well as himself must join with the commissioners in executing an assignment to the new assignees.

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20 Mar. 1743, cor. Hardw. C.
Ex parte Proudfoot, 1 *Atk.* 253.

10 May 1743, cor. M. R.
Tyrrell v. Hope, 2 *Atk.* 56a.

1 Aug. 1744, cor. Hardw. C.
Ex parte Simpson, 1 *Atk.* 68.
Vide 5 *Geo. 2. c. 30. l. 26.*
But this is to be understood where no obvious objection appears to the only admit a claim. 1 *Atk.* 73.

1 Aug. 1744, cor. Hardw. C.
Ex parte Grenier, 1 *Atk.* 91, 92.

6 Nov. 1745, cor. Hardw. C.
Walker and others v. Burrows,
1 *Atk.* 94.

3 July 1746, cor. Hardw. C.
Drury v. Man, 1 *Atk.* 95, 96.

22 Oct. 1746, cor. Hardw. C.
Brown, Assignee, v. Heathcote and another, 1 *Atk.* 162.
Vide S. P. Taylor v. Wheeler, 2 *Vern.* 564.

4 Ap. 1749, cor. Hardw. C.
Ex parte Newton, 1 *Atk.* 97.

2 June 1749, cor. Hardw. C.
Can v. Read, 3 *Atk.* 695.

29. A debtor to a bankrupt's estate paying the debt to one assignee is not a discharge; he should take a receipt likewise from the co-assignee, for assignees of bankrupts are in nature of trustees: otherwise as to an executor, because they have each a power over the testator's whole estate, and considered as distinct persons.

25 Nov. 1749, cor. Hardw. C.
Billon v. Hyde,
 1 *Ves.* 328. 1 *Atk.* 126.
Vide Rider v. Fowle, 3 *Lev.* 58.
Wilson v. Boulter, B. R. Hil.
 23 Geo. 1. Raym.

30. By an act of bankruptcy, all the bankrupt's real and personal estate vests in the assignees from the time it is committed, and it controls all subsequent acts of the bankrupt with regard to fairness or fraud in them: so that a sale of goods by bankrupt after the act committed is a sale of the property of the assignees, for which they may maintain trover. So it is as to the payment of money.

31 July 1752, cor. Hardw. C.
Ex parte Skip, 2 *Ves.* 489.

31. Assignees are not compelled to pay what is really due on usurious contracts.

24 Mar. 1754, cor. Hardw. C.
Ex parte Pelchier, *Ex parte Parsons*, *Amb.* 218.

32. Assignee of a bankrupt employs a broker to sell part of the effects, the broker receives the money, and at the end of ten days dies insolvent; the assignee not bound to make it good.

9 Aug. 1754, cor. Hardw. C.
Ex parte Dumas,
 2 *Ves.* 582. 585. 1 *Atk.* 232.

33. Merchants abroad draw upon a correspondent for a particular purpose, and remit other bills to answer it; the correspondent becomes a bankrupt; the bills remaining unnegotiated must be delivered up by the assignees, or the money received thereon, to the original owners.

S. C. The intent of the bankrupt laws is, to put all the creditors upon an equality, but as to the bankrupt's estate only; for assignees take it subject to all equities at the time of bankruptcy.

24 July 1755, cor. Hardw. C.
Hinton v. Hinton, 2 *Ves.* 633.

34. Assignees take the bankrupt's estate subject to all equity to which the estate was liable in the hands of the bankrupt.

T. 1784, cor. Thurlow, C.
Trower v. Townsend,
 1 *Bro. Ch. Ca.* 384.
Vide Forbes v. Ross, 2 *Bio. Ch. Ca.* 430.

35. Money having been kept by the assignee of a bankrupt in his hands for several years, and no dividend made, ordered to be paid with 5 per cent. interest, and all costs.

H. 1788, cor. Thurlow, C.
Setcole v. Healy,
 2 *Bro. Ch. Ca.* 322.

36. Money decreed to be paid to a person who became bankrupt, ordered to be paid to the assignee on the petition of the bankrupt and his assignee, without a supplemental bill being filed, the sum being too small to bear the expence.

37. Interest

§6. Assignees' Power and Duty.

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37. Interest at 4 per cent. against assignees of a bankrupt for not making a dividend, when they ought, will be increased upon circumstances.

Bankrupt Laws, 279. 4th edit.

H. 1790, cor. Thurlow, C.
Ex parte Hilliard, 1 Ves. jun. 89.
Vide Treves v. Townsend,
1 Bro. Ch. Ca. 384. Cooke's
Ex parte Lane, 1 Atk. 90. S. P.

38. Assignees of a bankrupt made no dividend, but thirteen years after the bankruptcy had from the produce of the property accumulated enough to pay fifteen shillings in the pound; a sale and distribution was ordered on petition of one creditor.

T. 1790, cor. Thurlow, C.
Ex parte Goring, 1 Ves. jun. 153.

39. Assignees kept the fund eight years without dividing; one admitted he had lent the share received by him at 5 per cent.; the other, that he had lent his share to a partnership in which he was engaged, with his own money, without any distinct charge of interest. Decreed to pay such interest as shall appear to have been made; and, where none, 4 per cent.

M. 1790, cor. Thurlow, C.
Buller, J. assist.
Hankey v. Garrett,
1 Ves. jun. 236.
Vide 1 Bro. Ch. Ca. 384.

40. Tenant in tail makes a mortgage, with covenant for further assurance, and becomes bankrupt; his assignees are bound by the covenant, though no recovery was suffered.

276. Edwards v. Appleby, 3 Bro. Ch. Ca. 652. (n).

H. 1791, & P. 1792, Canc.
Pye v. Daubun and another,
3 Bro. Ch. Ca. 595.
Vide Beck v. Welch, 1 Will.
2 Ves. jun. 236.

41. Assignees have all the equity the creditors have, and may impeach transactions which the bankrupt could not.

T. 1793, cor. Loughb. C.
Anderson v. Maltby,
2 Ves. jun. 255.

42. It having been found that large sums of money remain in the hands of assignees of bankrupts to the delay of dividends and the prejudice of creditors, ordered, that in every commission of bankrupt where the major part in value of the creditors present at the choice of assignees do not give directions where to place the bankrupts' monies pursuant to the statute of 5 Geo. 2. the assignees shall pay all monies received by them into the bank as often as the same shall amount to 100 l., there to remain until a dividend; and in the assignment from the commissioners to the assignees, a covenant to be inserted on the part of the assignees to pay such monies conformably to the directions of the creditors under the statute, or to this order. And it being found that assignees neglect to comply with the directions of the said act, in making a first dividend at the end of four months and within twelve months, and a second dividend within eighteen months from the issuing of the commission, ordered, that in cases where it appears the directions of the said act have not been complied with, the

Ord. Cur. 8 Mar. 1704,
per Loughborough, C.
4 Bro. Ch. Ca. 546.

the commissioners do cause due notice to be given in the *Gazette*, and other public papers, for the assignees to attend them, and shew cause why such dividend or dividends have not been made; and if the assignees do not shew satisfactory cause to the commissioners, *ordered*, that the commissioners do appoint a time and place to make such dividend or dividends, and to give due notice of such meeting.

Ord. Cur. 8 Mar. 1794,
per Loughborough, C.
4 Bro. Cb. Ca. 548.

43. *Ordered*, that if any assignee shall become bankrupt, he shall be removed; and that upon the death or bankruptcy of any assignee, upon application to the commissioners signed by one or more creditors who have proved their debts, and who are entitled to vote in the choice of assignees, the commissioners shall give notice in the *Gazette*, and other public papers, of their meeting to choose a new assignee or assignees in the room of the deceased or bankrupt assignee or assignees, and that the creditors who shall be present at such meeting, and who are entitled to vote in the choice of assignees, do proceed to such choice accordingly; and that all proper parties do join in an assignment to vest the bankrupt's estate in the new or surviving and solvent assignees; and that when any assignee shall become bankrupt, the commissioners in the commission against such assignee do take an account of the effects of the bankrupt assignee come to his hands, or to his order or for his use, making to all parties just allowances; and that such part of the estate of the bankrupt whose assignee shall become bankrupt as shall be remaining in specie, and all books, papers, and writings in the custody or power of the bankrupt assignee, shall be delivered over to the new or solvent assignee, who shall be admitted to prove under the commission against the bankrupt assignee for what shall be found due; and for the better taking such account, all parties are to be examined upon interrogatories or otherwise, as the commissioners think fit, and are to produce before them on oath all books, papers, and writings in their custody, as the commissioners shall direct.

Sec. 7. Of Suits at Law and in Equity
by and against Assignees.

1. **THOUGH** the assignee of a bankrupt claims under an act of parliament, yet, as the statute of limitations might be pleaded against the bankrupt, by the same reason it is pleadable against such assignees.

M. 1732, cor. King, C.
South-Sea Company v. Wyndesfell,
3 P. Wms. 144.
2 Eq. Abr. 74. pl. 28. 101. pl. 7.

2. The assignees of a bankrupt (against whom an extent has issued) paying the crown's debt, and performing a promise made by the bankrupt to pay a debt of his father's to the crown, the extent is discharged.

P. 1734, in Scacc.
Rex v. Lucy, Bunsb. 337.

3. The assignees of a bankrupt cannot bring a bill of revivor, but must sue by *original bill*. *This is daily experience.*

1738, in Scacc.
Anon. 2 Eq. Abr. 3. pl. 6.
Comyn, 590.

4. Where assignees of a bankrupt die or are discharged, and others are chosen in their room, they cannot revive *, but must bring a supplemental bill to entitle themselves to the benefit of proceedings in a former suit.

30 Nov. 1739, cor. M. R.
Anon. 1 Atk. 88, 89.
* Because there is no privity between them and the bankrupt, or at least but an artificial one; and yet if a supplemental bill were not allowed, the costs of the former suit would be absolutely thrown away.

5. A question arising, whether an *assignment of a term by a bankrupt* was to be considered as an *absolute sale* or by way of *mortgage* only. At a meeting of the bankrupt's creditors the matter under consideration was, *whether the assignees should bring a bill in order to be let into a redemption of this leasehold estate or not*, and the majority of the creditors were *against* such bill. The assignees thereupon could not bring it, being *disabled* by the 5 Geo. 2. c. 30. s. 38.; whereupon the *rest of the creditors*, who were for the bill, brought a bill in their own names *against the supposed mortgagee*, and also *against the commissioners and assignees*, praying to be let into the redemption of this leasehold estate. The assignees by their answer said, that they were desirous it should be redeemed; but the supposed mortgagee opposed it, and insisted that it was an *absolute purchase*. The question now was, Whether this bill was well brought? *Per curiam*.—It was, and that if the assignees refuse to bring a bill that is for the benefit of the bankrupt's estate, any creditor has a right to bring such bill under peril of costs; and decreed, that the assignees in the first place shall have liberty to re-

P. 1740, cor. Parker, J. abf. C.
Franklyn v. Farn, Barnard. 30. 38.
2 Eq. Abr. 102. pl. 10.
Vide Bickley v. Dorrington,
Monk v. Pomfret, in which cases it is laid down as a rule, that no person shall be allowed to come into equity for a redemption but he that hath the legal estate of the mortgageor.
Where there are proper persons, as executors or assignees, to get in the estate of another, equity will not suffer creditors to bring a bill, unless such executors or assignees collude with the debtor; then they may bring a bill, and charge the collusion.
Per Parker, C. J.

deem, and in default thereof that the plaintiff shall have this redemption.

P. 1740, Canc.
Ryal v. Roberts,
Barn. Eq. Rep. 38.
2 *Eq. Abr.* 8. c. 23.

6. Goods are assigned to plaintiff for securing a debt; the assignor afterwards becomes a bankrupt, and his assignees possess themselves of these goods. Plaintiff brought his bill against them for an account. They demur, for that this matter was relievable at law. *Non allocatur*, for though plaintiff might bring trover, yet, as the goods were assigned as a security, there is matter of account, and plaintiff's proper remedy is in equity.

3 Dec. 1740, cor. Hardw. C.
Bourne & al. Assignees v. Dodson,
1 *Atk.* 157. *Barnard.* 207.
2 *Eq. Abr.* 102. pl. 9.

7. Where a creditor of a bankrupt has received money of him, and an action is brought by the assignees to recover back such money, they must prove such creditor had notice of the bankruptcy when he received it.

Vide Billon and Hyde,
1 *Atk.* 118. S. P.

S. C. Where goods are delivered to a creditor after notice of an act of bankruptcy, the proper action for the assignees is trover; because there is a tort in detaining, though he came rightfully to the possession of the goods.

13 Aug. 1742, cor. Hardw. C.
Ex parte Whitcomb,
1 *Atk.* 91.
Vide 5 *Geo. 2. c.* 30. § 34, 35-38.

8. Creditors cannot give a general power to assignees to prosecute suits, or submit matters to arbitration at their own discretion; but there must be a distinct meeting of creditors upon a notice given in the *London Gazette* to consider of each particular suit or case for arbitration.

4 Nov. 1743, cor. Hardw. C.
Bramley and others v. Goodere,
Assignees, and others, 1 *Atk.* 76.

9. Where bills are brought to settle the demands of creditors in bankrupt cases, the rule of determination is the same as if heard upon petition.

6 Nov. 1745, cor. Hardw. C.
Walker and others v. Burrows,
1 *Atk.* 93-4.

10. *B.*, in 1718, after marriage conveys his real estate to trustees in consideration of 5 s., and other valuable considerations, in trust for himself for life, to his wife for life, then to his eldest son if he survived his father and mother, and so to the next son, &c. *B.* afterwards became bankrupt. This is a conveyance which falls directly within the clause of 1 *Jac. 1. c.* 15. § 5., and therefore the trustees were decreed to convey to the plaintiffs the assignees under the commission against *B.*

It is necessary to prove on the statute of 13 *Eliz.* that, at the making of the settlement, the person conveying was indebted at the time of the execution of the deed.

Upon

§ 7. *By and against Assignees.*

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Upon the *stat. 27 Eliz.* subsequent purchasers shall prevail to set aside a settlement that is voluntary, and not for a valuable consideration.

But this can only be applied to the case of subsequent purchasers, and therefore a plain distinction between the two statutes of 21 Jac. 1. and 37 Eliz.

The consideration in a deed of 5s., and other valuable considerations, does not oblige the court to hold it to be for a valuable consideration.

11. Where a solicitor carries on suits for an assignee without the authority of the majority in value of the creditors, the solicitor has his personal remedy against the assignee; but the estate of the bankrupt is not liable to his bill for such suits.

7 June 1749, cor. Hardw. C.
Ex parte Whitchurch and others,
1 Atk. 210.
Vide 3 Geo. 2. c. 30. § 38.

12. Bill against the executor and assignees of a certificated bankrupt deceased for an account; the assignees demurred. Demurrer allowed, the executor being alone answerable to the creditors, and the assignees to the executor only.

H. 1793, cor. Loughb. C.
Utterton v. Mair & al.
4 Bro. Ch. Ca. 270.

13. A trader having been once declared a bankrupt, the whole of his property is assigned under the first commission, and till he obtains his certificate he is incapable of contracting or trading for his own benefit.

9 Feb. 1793, cor. Loughb. C.
Ex parte Brown, 2 Ves. jun. 69.
Vide *Ex parte Hollingsworth,*
22 Nov. 1791 (n.). The doctrine laid down in *Martin v. O'Hara,* Cowper, 824. and *Ex parte Proudfoot,* 1 Atk. 252. in this case is confirmed by express judgment.

Assignees under a second commission would therefore be nonsuited in trover against assignees under the first.

14. In a suit against the assignees the bankrupt may be examined as a witness, and therefore ought not to be joined as a party.

T. 1794, in Scacc.
Griffin v. Archer & al.
2 Anstr. 478.

15. After judgment by default in an action upon a dividend under a commission of bankruptcy the assignees filed a bill for discovery, and to have the proof of the debt expunged. Demurrer allowed, the course being by petition.

T. 1795, cor. Loughb. C.
Clarke v. Capron, 2 Ves. jun. 666.

16. Upon a bill by assignees of a bankrupt for specific performance of an agreement (previous to the bankruptcy) to grant a lease, the case consisting of a combination of circumstances, the evidence might sustain the relief with some modification; upon which a demurrer was over-ruled.

25 July 1796, cor. Loughb. C.
Brooke v. Hewitt, 3 Ves. jun. 253.

Sec. 8. Of the Commissioners' Assignment, and Bargain and Sale, and what shall or shall not pass thereby.

H. 1681, cor. Finch, C.
Abery and another v. Williams,
1 Vern. 27.

Lord Chancellor said, the law was hard with tradesmen who deal with bankrupts before notice, and the assignees ought not to be assisted in equity in any such case.

T. 1683, cor. North, C. S.
Knight v. Bampheld & al.
1 Vern. 179.

P. 1689, cor. Lds. Comrs.
Yandeancker v. Desbrough,
2 Vern. 96, 97.
1 Eq. Abr. 53. pl. 3.

Vide Drake and Mayor of Exon, 1 Ch. Ca. 71. cited.
1 Eq. Abr. 52. pl. 1.

H. 1690, Canc.
Hill v. Moor, Pres. in Ch. 18.

M. 1690, Canc.
Moyes v. Little, 2 Vern. 194.
1 Eq. Abr. 53. pl. 4.
Vide Drake and Mayor of Exon, 1 Ch. Ca. 71. *Crispe v. Pratt,* *Parker v. Bleake,* 10. 437. 451. Mar. 24. Cro. Cir. 548. 1 Rol. Abr. 523.

1. **EQUITY** will not compel a man to discover what goods he bought of a bankrupt after his bankruptcy, and before the commission sued out, where the party had no notice of the bankruptcy.

2. *A.* settles an equity of redemption for a jointure, and afterwards becomes a bankrupt; the assignees settle an account with the mortgagee. The jointress shall be bound by this account, unless she can shew particular errors; she however had leave to amend her bill.

3. Devise of 800*l.* to be invested in land for the benefit of the wife of *J. S.* for her life, and afterwards for her children; and the interest of the money to go as the profits of the land if bought. *J. S.* becomes a bankrupt. The interest of the 800*l.* shall not go to satisfy the creditors; this not being a trust created by the bankrupt but by the wife's relation, and intended for her benefit.

S. C. Lessee for years becomes bankrupt. The assignee under the commission is not entitled to the benefit of a covenant in the lease for renewal at the end of the term.

4. *A.* puts out 1000*l.* at interest to the *East India Company*, and takes bond for it in the name of *J. S.* his wife's relation; *A.* becomes a bankrupt; *J. S.* is summoned before the commissioners, but previous to his examination he tells the *East India Company* that the money was not his, but that they should pay it to the person who brought the bond. *A.*'s wife brings the bond, and has the money paid her. Equity will not relieve the assignees of *A.* against it.

5. A man on his son's marriage covenants during his own life to pay his son an annuity; the son becomes a bankrupt. The assignee under the statute shall not have the benefit of this covenant.

§ 8. *Comrs.' Assignment, and what passes.*

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6. A man had devised lands (which were in mortgage) to be sold, and the surplus of the money to be paid to his daughter; the daughter married a man who soon became a bankrupt, and the commissioners assigned this interest of the wife; the husband died, and the assignees brought this bill against the wife and trustees to have the land sold, and the surplus of the money paid to them; but the court would not assist, as the wife was wholly unprovided for. Bill dismissed.

M. 1693, cor. M. R.
Parker v. Dykes,
1 *Eq. Abr.* 54. pl. 6.

7. *A.* is bound in a bond to *B.* for payment of money; *B.* assigns it to *C.* in satisfaction of a debt; *B.* becomes bankrupt, and a commission is taken out against him. *C.* in equity is well entitled to the bond, for as the bankrupt himself was bound by his assignment, so those claiming under the commission cannot be in a better case than the bankrupt himself was.

H. 1701, cor. Wright, C. S.
Peters & al. v. Soams & al.
2 *Vern.* 423.
1 *Eq. Abr.* 44. pl. 3.

It was insisted that *B.* was a bankrupt before he assigned the bond. Lord Keeper directed an issue as to that point.

A. owes money to *B.* by bond; *B.* owes money to *A.* for rent; *B.* assigns the bond for a valuable consideration to *C.*; *B.* becomes bankrupt. Whether *C.* shall retain the rent due to him from the bankrupt out of the bond?

Lord Keeper doubted whether *A.* might not retain for his debt, and that stoppage seemed to be a good equity in such case.

8. A legacy given to a bankrupt before his bankruptcy, may be assigned by the commissioners for the benefit of the creditors.

H. 1701, Canc.
Toulson v. Groun, 2 *Vern.* 432.
1 *Eq. Abr.* 53. pl. 5.

9. A copyhold is bound by the surrender before bankruptcy, though that surrender is not duly presented within the twelve months, and has become void by the custom of the manor confirmed by act of parliament.

11 Nov. 1706, cor. Cowper, C. S.
Taylor v. Wheeler, 2 *Vern.* 564.
cited in *Finch v. Lord Winchelsea*, 1 *P. Wms.* 280.
1 *Eq. Abr.* 122. pl. 3. 312. pl. 8.
Vide Tyrrell v. Hope, 2 *Atk.* 562.

10. *A.* by articles was to build houses; *B.* furnishes him with materials, and takes an assignment of the articles for his security, but before the assignment *A.* was a bankrupt; *B.* has a special equity, inasmuch as by what he advanced *A.* was enabled to perform his agreement to the common benefit of the creditors, and therefore *B.* shall have all the money he advanced after he had a specific interest in the articles; but as to what he gave credit for before, he trusted as another creditor.

P. 1715, cor. Cowper, C.
Langton v. Hall,
7 *Vin. Abr.* 73. pl. 4.
2 *Eq. Abr.* 108. pl. 1.
Lord Chancellor compared this to a case of a man building a ship who becomes bankrupt. *B.* afterwards furnishes materials to finish it. *B.* shall have all his money, and not come in average with the other creditors.

11. A bankrupt though in possession, if empowered to dispose of goods in trust, they are not liable to the bankruptcy.

T. 1716, cor. Cowper, C.
Copeman v. Gallant,
1 *P. Wms.* 314.
2 *Eq. Abr.* 113. pl. 2.
(1 *Atk.* 175. 182.
and 1 *Ves.* 365. 371.) held this case to be well decided on the construction of the act of 21 Jac. 1.
c. 19.

Note; Lord Hardwicke and Lord Chief Baron Parker, in *Ryal and Rowles*, (1 *Atk.* 175. 182. and 1 *Ves.* 365. 371.) held this case to be well decided on the construction of the act of 21 Jac. 1. Vol. I.

é. 19. as restrained by the preamble, but they disapproved of Lord Cowper's opinion in this case with respect to the operation of the preamble.

Vide Ex parte Flynn, 1 Atk. 185. *Mare v. Cadell*, Cowp. 252. *Walker v. Burnell*, Dougl. 317. *Collins v. Forbes*, 3 Term Rep. 316. *Jarman v. Woollaton*, 3 Term Rep. 618.

M. 1717, cor. Cowper, C.
Jacobson and another v. Williams,
1 P. Wms. 382, 385, 386.
1 Eq. Abr. 54. pl. 7.
Gilb. Eq. Rep. 140.

See more in *Richmond v.*

Taylor, 1 P. Wms. 734. — Where a husband becomes bankrupt, all such property of his wife as he could assign or release passes by the commissioners' assignment. *Vide Miles v. Williams*, 1 P. Wms. 251. But they take it, subject to the same equity of providing for the wife. *Vide Bosvill and Brander*, 1 P. Wms. 458. *Ex parte Coyssegame*, 1 Atk. 192. *Grey v. Kentish*, 1 Atk. 280. *Worfall v. Marlar*, and *Bushman v. Pell*, 1 P. Wms. 459. (n.)

Vide Higden v. Williams, 3 P. Wms. 132. *et vide* 2 Atk. 420.
As to what interests of the wife the commissioners may assign, *vide* Cooke's B. L. 4 ed. 296.

12. Husband before he receives the wife's fortune becomes bankrupt. The assignees shall not receive it without making some provision for the wife.

A possibility of right in the bankrupt is not assignable by the commissioners.

S. C. Commissioner after assigning bankrupt's effects, and giving him his certificate and discharge, cannot make a second assignment.

T. 1718, cor. M. R.
Bosvill v. Brander,
1 P. Wms. 458, 461.
In *Jewson v. Moulson*, 2 Atk. 420. Lord Hardwicke expresses great doubt whether equity would interfere where the husband or his general assignees could get possession of the wife's property without the aid of the court, as to which *vide* *Winch v. Page*, Bunb. 86. *Anon. Prec. in Ch.* 548. *Harrison v. Buckle*, 1 Stra. 503. But where the property is a subject of equitable cognizance, it is clear that the general assignees of the husband (whether by the operation of law or otherwise) are subject to the same equity as the husband, by whomsoever the application may be made. *Vide Jacobson v. Williamson, ante*, and the cases there referred to. *Vide Watson v. Maseall*, 1 P. Wms. 459. (n.) *Saddington v. Kinsman*, 1 Bro. Ch. Ca. 44. *Wenman v. Mason*, *Worrall v. Maslar*, *Bushman v. Pell*, 1 P. Wms. 459, 460. (n.) Most of which cases have arisen between the wife and the general assignees of the husband. But where the husband has assigned some particular chose en action or trust term of the wife for a valuable consideration, there is more doubt whether the court will impose any terms on the particular assignee in favour of the wife. *Vide Sir Edw. Turner's case*, 1 Vern. 7. *Pitt v. Hunt*, 1 Vern. 18. *Tudor v. Samyne*, 2 Vern. 270. *Packer v. Wyndham*, *Prec. in Ch.* 412. *Walter v. Saunders*, 1 Eq. Abr. 58, pl. 5. *Bates v. Dandy*, 1 Atk. 207. *Sed quare*, Whether in these cases of particular assignments any distinction has been made between a trust term and a chose en action of the wife. *Vide Pryor v. Hill*, 4 Bro. Ch. Ca. 139.

13. A feme sole mortgagee in fee marries; the husband becomes bankrupt and dies. The assignees are entitled to the mortgage. *Secus*, if it was settled on the wife by articles before marriage.

M. 1721, cor. M. R.
Orlebar v. Fletcher and Duke of Kent, 1 P. Wms. 737.
2 Eq. Abr. 108. pl. 2.
Vide 21 Jac. 1. c. 19. s. 9.
Vide Sir Geo. Newland and *Beckley v. —*, 1 P. Wms. 92.
* The reporter says, it seems to be admitted that the judgment creditor may extend the lands in the hands of the purchaser, but C. could not be deemed a purchaser till he had paid all the money.

14. A trader seised of lands in fee gives judgment to B., then sells the land to C., and afterwards becomes a bankrupt. Though the judgment creditor has no preference to other creditors, whether he may not extend the lands in C.'s hands, C. having purchased before the bankruptcy? So if A. the trader gives judgment to B., and agrees to sell to C. for a valuable consideration, and then becomes bankrupt, it seems the judgment shall bind the lands in the hands of C., but whatever money C. was to pay the bankrupt, shall be liable to the bankruptcy.

15. A deed made by a trader two months before an act of bankruptcy committed for securing the fortunes of children out of trust monies in his hand is good against the assignees.

S. C. Assignees can take nothing but what the commissioners can assign, and the commissioners can assign nothing but what the bankrupt could honestly assign to them.

16. Defendant made a lease of an inn to A. for years, with a proviso that the lessee, his executors or administrators, should not assign the term without lessor's consent under his hand in writing, with a power of re-entry in such case to the lessor, and that the lease should be void. Lessee dies, and his executor enters and enjoys the premises, and then becomes a bankrupt. The commissioners assign this lease to the assignees, and afterwards, in consideration of 50 l. they (the assignees) assigned it to plaintiff, who brought this bill to be relieved against this proviso, and to stay proceedings in an ejectment brought by the lessor against him thereupon. Defendant by his answer insists upon the forfeiture at law, and that the proviso ought not to be set aside in equity. Lord Chancellor held clearly, that the assignment by the commissioners (being done by authority of a statute, which will supersede any private agreement between even the parties) and the assignment over by the assignees was no breach of the condition; decreed plaintiff to hold and enjoy, and an injunction to stay proceedings at law.

17. J. S. devised lands to his daughter, being a feme covert, for her separate use, without appointing any trustees. The husband who is a trader becomes bankrupt. The devised premises shall not be subject to the bankruptcy, for as testator had a power to devise the premises to trustees for the separate use of the wife, equity will supply the want of them, and make the husband trustee, and his assignees were decreed to join in a conveyance.

18. A contingent interest or possibility in a bankrupt is assignable by the commissioners, as where a devise was to such of the children of N. as shall be living at his death. A. had issue B., who becoming a bankrupt got his certificate allowed. This contingent interest held liable to the

Q2

bankruptcy

P. 1722, cor. Macclesfield, C. Cock v. Goodfellow, 10 Mod. 495. 2 Eq. Abr. 100. pl. 2.

Vide Small v. Oudley, 2 P. Wms. 430. and Jacob v. Sheppard there cited, which is stated at length by Lord Mansfield in 1 Burr. 480.

M. 1725, cor. Macclesfield, C. on Appeal from the Rolls.

Goring v. Warner,

7 Vin. Abr. 85. pl. 9.

2 Eq. Abr. 100. pl. 3.

Vide South-Sea Company v. Wymondsell, 3 P. Wms. 144. where it was held that the statute of limitations being pleadable against a bankrupt, is pleadable also against his assignees. It is in fact a rule in equity that neither the commissioners or assignees can be in a better situation than the bankrupt, but stand exactly in his place. The principal case, however, seems to be an exception to that rule.

M. 1725, cor. M. R. Bennett v. Davis, 2 P. Wms. 316.

2 Eq. Abr. 114. pl. 6.

Vide Jacobson v. Williams, 1 P. Wms. 382. Bolwill v. Brander, 1 P. Wms. 458. Rolfe v. Budder, Bunb. 187. Darley v. Darley, 3 Atk. 399. Haslington v. Gill, 3 Term Rep. 620. (n.) Lee v. Prieux, 3 Bro. Ch. Ca. 381.

M. 1731, cor. Jekyll, M. R.

Higden & al. v. Williamson,

3 P. Wms. 132.

2 Eq. Abr. 89. pl. 14.

114. pl. 8.

This case is registered tit. Higden v. Watkinson, vide Reg. Lib. A. 1731, fo. 188.

Vide Jacobson v. Williams, bankruptcy (and assignable) forasmuch as the son
 1 P. Wms. 382. Jewson v. in the father's lifetime might have released it.
 Moulson, 2 Atk. 420.

Note; His Honour distinguished this case from Jacobson and Williams, for there the husband could not come at the wife's portion without the aid of equity, but here was an interest that the bankrupt could assign or release, and the stat. of 13 Eliz. c. 7. § 3. comprehends *all that the bankrupt could depart with*; and besides, when this cause came on by way of appeal before Lord King, in M. 1732, his Lordship observed that the word *possibility* is in 5 Geo. 2. c. 30. and all the latter statutes concerning bankrupts, and affirmed the decree at the Rolls.

Sed vide Moth v. Frome, Amb. 394. where an estate descended to a bankrupt as heir at law after she had obtained her certificate. M. R. held it did not go to the assignees, for it was not that kind of possibility meant by 5 Geo. 2. c. 30.; there was no *persona designata*, it could not be assigned, or cleared, nor disclosed at the last examination.

In Moth and Frome his Honour said, the case of Higden and Williamson was the occasion of the act of 5 Geo. 2. concerning bankrupts; and it may be worthy of remark, that that case came on before Lord King on appeal from the Rolls, in M. 1732, when his Lordship affirmed his Honour's decree (as it seems) immediately after the passing of that act.

M. 1733, cor. Talbot, C.
Jordan v. Savage and others,
 2 Eq. Abr. 102. pl. 8.

19. *J. S.* was seised of copyhold lands within the manor of *W.* and *D.*, the custom of which is, that the first wife shall have her free-bench in all the land the husband was ever seised of during the coverture; that the second wife should have a moiety, and the third a third part, so long as she kept her husband above ground. *J. S.*, in consideration of marriage with the daughter of *A.*, covenanted within two months after the marriage to settle all his lands to the uses following, *viz.* for the one part to him and his wife for life, remainder to his first son in tail male, &c., remainder to the first and every other daughter in tail female, remainder to his own right heirs; as to the other moiety to himself for life, remainder *ut supra* to the issue, &c. provided that the lands not settled in jointure on his wife should be charged with the payment of 300*l.* for younger children's portions; provided also that the lands settled on the wife should be in lieu of her customary estate. By indorsement on the articles of the same date it was mutually agreed by all the parties, that *J. S.* should have a power to charge the land not settled in jointure with 300*l.* for the payment of his debt. *J. S.* became a bankrupt, and died without performing the articles, or executing the power; and the assignees brought their bill against the heir and the younger children of *J. S.* to have 300*l.* which *J. S.* might have raised for the benefit of creditors; and the younger children filed their bill against the heir, the mother, and the assignees, to have their fortunes raised. On this case the points following were determined by King, C. 1st, As the jointure settled on the wife is not made expressly in lieu of her free-bench, but only mentioned
 in

in the proviso, and she being an infant at the time of making the articles, and not party to them, whether she should be excluded from claiming her free-bench; and it was held she should, and be obliged to abide by her jointure. 2dly, Whether the settlement should be carried into execution; and resolved it should, for as it must have been specifically executed against the covenantor if he had not become a bankrupt, so the assignees who stand in his place shall make it good. 3dly, Whether the power of charging the land with debts was vested in the assignees; and it was compared to a power of revocation which a man leaves unexecuted, and for which his creditors shall have remedy against the heir. Lord Chancellor decreed, that the assignees who were in possession of the land should account for all the profits; for as to the money chargeable on the estate, he said the charging it was a personal act, which not being done, he would not supply the defect. The court decreed the settlement should be strictly executed, and the reversion in fee to the assignees.

Vide Vizett v. Longdon, where money was settled on a wife before marriage for her provision; and M. R. was of opinion, she should have both that and her dower; but Lord C. reversed the decree, and confined her to her settlement.

20. *J. S. by will gives to his daughter A. (then wife of B.) his gold watch, jewels, china, and household goods, to be at her disposal, and to do therewith as she should think fit.* Testator dies, the daughter's husband becomes a bankrupt. This is a devise to the separate use of the wife, and not assignable by the commissioners; and so decreed.

1733, cor. M. R.

Kirk v. Paulin,

2 *Eq. Abr.* 115. pl. 9.

7 *Vin. Abr.* 95. pl. 43.

Note; A case was cited as before Lord Cowper of a devise to a feme covert for her use and benefit, and held, that it not being for her separate use, it was the husband's; but his Honour

was dissatisfied with the determination as against the intention of the testator.

21. *J. S. not in debt nor then a trader, makes a voluntary settlement on a child; he afterwards becomes a trader, and sixteen years after that he becomes bankrupt.* Held clearly not within 1 *Jac. 1. c. 15. s. 5.* and therefore not liable to the bankruptcy.

T. 1734, cor. Jekyll, M. R.

Lilly v. Osborn, 3 *P. Wms.* 298.

2 *Eq. Abr.* 115. pl. 11.

His Honour made this decree on the authority of *Crisp and Pratt*, Cro. Car. 548. which was a case of a settlement made by a clear man not a trader until two

years after, nor a bankrupt until six years after the settlement. Held not within the act. But if the party be a trader at the time, it seems his solvency will not protect the transaction from the operation of the statute. *Fryer v. Flood*, 1 Bro. Ch. Rep. 160.

22. *A. by his will gave two legacies to his daughter B. of 500l. each, one of them for her sole and separate use, she being married without a settlement.* A decree was obtained for placing out these legacies for B's benefit. B's husband upon petition to Lord Macclesfield obtained an order (his wife consenting) for one 500l., and the other 500l. by consent to be laid out for the separate use of the wife. The husband and wife (she being nine-

T. 1734, cor. Talb. C.

Halsey v. Badham,

2 *Eq. Abr.* 154. pl. 19.

Vin. Abr. tit. *Baron and Feme*, (E. a. 7), ca. 12.

teen) join in an assignment of the last 500*l.* to secure a debt to D., and the husband becomes a bankrupt. D. brought a bill against the assignees under the commission, and also against the husband and wife; and Lord King decreed the assignment good, and the residue to be paid to the assignees. The wife rehears, alleging that she was poor, and not able to produce the order of Lord Macclesfield. Objected, that the order was voluntary, and did not bind creditors. Objected also, that the assignment was good, it being of her separate estate, though under twenty-one; and that *infants may execute a power by an attorney*. Lord Chancellor said, As to the objection that the order was voluntary, and did not bind creditors, that is a hard censure on the proceedings of this court; and such settlements are usual practice, and this present one is according to the will. Where the husband makes a *voluntary* provision for the wife to take place after his death it has been adjudged fraudulent, but *here it is set apart immediately*. As to the assignment itself, he admitted, that if the *feme had been sole it had not been good*; but the case is stronger, *because she was a feme covert*; and though in cases of mere powers or authorities *infants may execute because nothing moves from them*, yet this is an interest, and *can no more be departed with in equity by a infant, than by an infant's assignment of a legal estate at law*. Decree varied.

1734, cor. Talbot, C.
Grosi & al. v. Dufresney & al.
Assignees,
2 Eq. Abr. 111. pl. 5.

23. Plaintiff and A. and B., in November 1725, became partners in trade in *Holland*, and executed articles according to the laws and customs of that country. On 12 May 1728 A. withdrew, and the trade was carried on by plaintiffs and B. under the same articles. B. was entrusted with the partnership goods, which he embezzled, and suffered the partnership debts to remain unpaid, and having contracted private debts, a separate commission of bankruptcy was taken out against him on 30 November 1733. His assignees took possession of the partnership effects, and received partnership debts to the amount of 6500*l.* Plaintiffs bring their bill to have the partnership debts and effects applied to the payment of the demands on the copartnership, and to have a satisfaction for what the bankrupt had embezzled, and to divide the residue among the partners according to their shares, and in the mean time to restrain a sale of the partnership effects then on hand. The assignees

signees by their answer admit the receipt of the property, and submit to apply it as the court shall direct. Decreed, that the Master should take an account of the *partnership debts received by plaintiffs in Holland, and of the partnership estate in England received by the assignees, and of the partnership debts owing by the bankrupt and the plaintiffs; that the joint creditors of the bankrupt and the plaintiffs come in and prove their debts before the Master; that an account be taken what embezzlement the bankrupt has made of the copartnership estate; and in taking accounts, plaintiffs and defendants to be examined on oath to produce all books, &c. and to have all just allowances; that what the Master shall certify the copartnership debts shall amount to shall, in the first place, be paid by the plaintiffs and defendants to the joint creditors in proportion to their debts, and as far as the copartnership estate in their hands will extend; that if it shall appear any of the partnership estate remains in the plaintiffs and defendants hands after the partnership debts are paid, then the Master to divide the same into three parts, and the plaintiffs are to take two-thirds, and out of the bankrupt's third part they are to take what it shall appear the bankrupt has embezzled of the partnership effects; and if there shall be any residue of the bankrupt's third part, after the partnership debts and the embezzlement of the bankrupt are satisfied, then the same is to be paid or retained by the assignees for the benefit of the bankrupt's separate creditors; that the Master may state any thing specially, and all parties are to be paid their costs of suit out of the copartnership estate.*

24. A landlord may distrain for his whole rent, even after assignment or sale by the assignees, if the goods are not removed; for no provision is made in the case of bankruptcy in the statute which gives the landlord a year's rent on executions.

S. C. The assignment has a retrospect so as to avoid any mesne acts done by the bankrupt.

In *Ex parte Jacques*, 14 Dec. 1730, the landlord distrained while the messenger was in possession; when assignees were chosen, they petitioned to have the goods restored; but Lord King dismissed their petition. *Ex parte Dillon*, 27 Feb. 1733, the assignees were in possession when the landlord distrained, and on their petition Lord C. confirmed the right of the landlord to distrain.

4 April 1739, cor. Hardw. C. *Ex parte Plummer*, 1 Atk. 103.
In this case the rent due was a year and quarter. Lord H. said, there was a case before the Lords Commissioners where a landlord, who had made no distress, was considered within the equity of the statute, which gives a year's rent on executions, a commission being an execution in the first instance.

25. An assignment of a ship at sea for a valuable consideration may be good against assignees of a bankrupt, though no possession is taken thereof; but otherwise of goods on land.

5 Dec. 1740, cor. Hardw. C. *Bourne & al. Assignees, v. Dodson*, 1 Atk. 154, 156, 157. Barn. 107.
2 Eq. Abr. 102. pl. 9.

Vide Stephens v. Sole, cor.
Tabb. C. 6 Jan. 1736, cited in
S. C.

Lord H. said, the courts of law
always consider such a case a hard
one, and hold assignees to a strict
proof of notice.

Vide Billon and Hyde,
1 Atk. 128. S. P.

21 Feb. 1742, cor. Hardw. C.
Fitzer v. Fitzer and another,
2 Atk. 515.
Vide Jewson v. Moulson,
2 Atk. 417.

20 Mar. 1743, cor. Hardw. C.
Ex parte Proudfoot, 1 Atk. 252.

10 May 1743, cor. M. R.
Tyrrell v. Hope, 2 Atk. 562.
Vide Taylor v. Wheeler,
2 Vern. 564.

4 Nov. 1743, cor. Hardw. C.
Ex parte Byass, 1 Atk. 124.

S. C. A pawnee has only a special property in goods if not redeemed within the time.

An owner of hoys mortgages them, and after so doing is suffered by the mortgagee to use them for three years together, and has money lent him upon the credit of being the owner. They are liable to be sold under a commission of bankruptcy.

S. C. Where a creditor of a bankrupt has received money of him, and an action is brought by the assignees to recover back such money, they must prove such creditor had notice of the bankruptcy when he received the same.

S. C. Where goods are delivered to a creditor after notice of an act of bankruptcy, the proper action for the assignees is trover, because there is a tort in detaining, though he came rightfully to the possession of the goods.

26. Creditors in bankrupt cases are entitled to the interest which the husband has in the wife's *chose in action* during his life.

27. No second commission can be taken out before a bankrupt has his certificate under the first; for till then nothing can pass to the second, at least of personal estate.

S. C. All future personal estate is affected by the assignment, and every new acquisition will vest in the assignees; but as to future real estate, there must be a new bargain and sale.

28. The court will not carry a voluntary conveyance of a bankrupt into execution against his assignees; otherwise as to a conveyance for a valuable consideration before the bankruptcy.

29. *D.* being indebted to *M. K.* in 71*l.*, gave him the following note:—*I promise to pay to M. K. the sum of 71*l.* Witness my hand, August 28th, 1734. E. D.* *M. K.* being indebted to *B.* in 92*l.* 19*s.* 6*d.* delivers *D.*'s note to him, that he might receive the money in part of his debt, who gave the following receipt:—*Received 20th December 1734 a bill for 71*l.*, which when paid will be on account of Thomas Byass. M. K.* becomes a bankrupt, but not having indorsed or assigned the note to *B.*, the assignees apply to *D.*'s solicitor, and receive of him the 71*l.* The assignees of *K.*'s estate considered as trustees for the petitioner with

with respect to the sum of 71 *l.*, and ordered to pay him the money accordingly.

30. The clause 21 *Jac.* 1. which says, "*That all goods in the possession of a bankrupt, where- by he gains a general credit, shall be liable to his creditors,*" relates to goods the bankrupt has in his own right only.

1 Aug. 1744, cor. Hardw. C. *Ex parte Marjib*, 1 *Atk.* 159.

Lord H. said, this statute is so darkly penned, it is hardly possible to put a meaning upon some of the clauses.

31. *B.* in 1718 after marriage conveys his real estate to trustees, in consideration of 5 *s.*, and other valuable considerations in trust for himself for life, to his wife for life, then to his eldest son, if he survived his father and mother; and so to the next son, &c. *B.* afterwards became bankrupt. This is a conveyance which falls directly within the clause of 1 *Jac.* 1. c. 15. s. 5. and therefore the trustees were decreed to convey to the plaintiffs the assignees under the commission against *B.*

6 Nov. 1745, cor. Hardw. C. *Walker and others v. Burrows*, 1 *Atk.* 93, 4.

It is necessary to prove on the statute of 13 *Eliz.* that at the making of the settlement the person conveying was indebted at the time of the execution of the deed.

32. *H.* a silkman, and *F.* a dealer in coals are partners in both trades. They afterwards dissolve the partnership, and *F.* gives *H.* a release of all demands, and took upon him the payment of the debts due from the coal trade, and *H.* the debts from the silk trade, and the respective debts are assigned accordingly. *H.* dies, and a commission of bankruptcy is taken out against *F.*; and the messenger attempting to seize the effects of *H.* in the hands of his representative, is opposed and turned out of possession. The assignee petitions, complaining of the force upon the messenger. By the release of *F.* to *H.* the whole property of the silk trade vested in *H.*; and the assignees of *F.* standing in no better light than the bankrupt, the goods of *H.* ought not to have been seized under the commission against *F.* And the petition dismissed with costs.

20 Jan. 1746, cor. Hardw. C. *Ex parte Turner*, 1 *Atk.* 136, 7.

Lord H. thought the messenger's possession in this case was illegal, yet it was not justifiable to turn him forcibly out of possession; for the owner of the goods ought to have asserted his right by course of law; however the charge of force against the messenger was not made out satisfactorily.

33. Previous to the marriage of *G. S.* the father of the intended wife covenants to pay 1000 *l.* to the husband on the marriage, and that his heirs, executors, &c. should likewise pay to the husband, his executors, &c. six months after the father's death, 500 *l.*, as the remainder of the wife's portion; and by the same deed the husband contracted he would give security by specialty, that in case his wife

3 Feb. 1746, cor. Hardw. C. *Brett v. Forcer and others*, 3 *Atk.* 403.

It was contended by the defendant's counsel that the court could not interfere in this case; but Lord H. thought otherwise; for if he were to stand neuter, the assignees under the commission who would have the legal interest might run away with it,

and they have less equity than the plaintiff.

wife survived him, his heirs, executors, &c. should within six months after his death pay her 1000*l*. He gave a bond three days after the marriage, and then becomes a bankrupt, but before the bankruptcy, and after the father-in-law's death, the husband being indebted to the plaintiff, assigns the 500*l*. to him as a security for the debt. Upon a bill by the assignee of the 500*l*. against the executrix of the wife's father, and the bankrupt and his wife, and the assignee under the commission for this 500*l*. Lord Chancellor directed the executrix of the wife's father to account for the 500*l*. to the plaintiff, as it never was the money of the wife, but a debt due to the husband himself.

S. C. Where the wife has a demand in her own right, and the husband applies in her right, if there be no agreement before marriage on her behalf, the court will take care of her interest; but in this case the father covenanted with the husband, and the money never was the property of the wife, but of her husband.

Per Lord H.—There are many cases where an assignee has been held to be in a better condition than the assignor, but none where he has been held to be in a worse.

S. C. If the husband had not been a bankrupt, and had brought a bill for performance of the father's covenants under the articles, the court could not have compelled him to do more than give a bond, and the wife must have taken her chance as to her share of the husband's personal estate, and his assignee shall not be in a worse condition than himself.

3 July 1746, cor. Hardw. C.
Drury v. Man, 1 *Atk.* 99.

34. Commissioners ought to except copyholds out of the deed of assignment of the bankrupt's estate, because it will save the expence of two fines to the lord, as they may convey to the purchaser thereof in the first instance by bargain and sale.

No prejudice will accrue to creditors by leaving out copyhold estates in a temporary assignment; for an extent of the crown will not affect it.

22 O&A. 1746, cor. Hardw. C.
Browne, Assignee, v. Henckote and another, 1 *Atk.* 160. 2.

35. *R. W.* and his partner gave a bond to *H.* for 1200*l*., and the same day by deed assigned to *H.* or order the goods in two ships then at sea, and also thirteen bills of lading, and policies of insurance concerning the said goods, as a collateral security, the latter indorsed to *H.*, the former not. A bill brought by the assignees of *R. W.* (who had become a bankrupt) for these goods, insisting that *R. W.* acted as the visible owner of the ship and cargo, being not put into the possession of *H.*; and therefore the plaintiff entitled thereto for the benefit of the creditors at large. The court of opinion,

nion, that every thing which could shew a right to the ship and cargo being delivered over to *H.*, *R. W.* could no longer be said to have the order and disposition of them, and therefore not within the meaning of 21 *Jac.* 1. c. 19. and consequently *H.* has a right to retain the ship and cargo till the principal sum of 1200*l.* and interest is satisfied.

A. being indebted to *B.*, assigns over barges to *B.*, who suffers *A.* to keep the possession. This is a fraud on the creditors at large, and the barges may be seized under a commission of bankruptcy taken out afterwards against *A.*

Vide Ryal and Stevens, Bourne v. Dodson, Stevens v. Sole, cited. *Vide* also Jacobs v. Sheppard.

Where there is an assignment of an outward-bound cargo, it is a complete contract, though the cargo is not delivered to the assignee.

Indorsing bills of sale does not amount to an assignment, unless the goods are directed to be delivered to the assignee.

Assignees under commissions of bankruptcy take subject to all equitable liens against the bankrupt himself.

S. P. Taylor v. Wheeler,
2 Vern. 564.

Assignments of choses in action for a valuable consideration are good against creditors under a commission of bankruptcy.

Cock v. Goodfellow, T. 3 Geo. 1.
cor. Macclesfield, C.

36. Notwithstanding a commission and a messenger is in possession of the goods, the landlord may distrain for rent, even after an assignment, if the goods are on the premises.

11 April 1747, cor. Hardw. C.
Ex parte Grove, 1 Atk. 104.
Vide *Ex parte Plummer, ante,*
and notes.

37. Ecclesiastical estates may be taken in execution, and upon a sequestration likewise; and the method which is taken in executions and sequestrations may be followed upon commissions of bankruptcy.

24 Dec. 1747, cor. Hardw. C.
Ex parte Meymott, 1 Atk. 200.

38. One *Matthews* sold to one *Flyn* and *Field* two-thirds of five hundred barrels of tar, at the rate of 9*s.* per barrel, and the other third he agreed should go and be consigned to them for sale at his risk, and on his own account; and that he should be at the charge of cartage and portage, and shipping of the whole. *Matthews* accordingly caused the tar to be put into a warehouse or cellar of his own for the purposes of the agreement; *Flyn* and *Field* at the same time paid *Matthews* in London bills 150*l.* the amount of two-thirds, and *Matthews* made them out a bill of parcels. *Matthews* afterwards becomes a bankrupt, and the assignees take possession of the tar,

23 Dec. 1748, cor. Hardw. C.
Ex parte Flyn and another,
1 Atk. 185.

as they found it remaining in his warehouse. This was held not to be within the intent of 21 Jac. 1. c. 19., which meant to guard against leaving goods in the possession, order, and disposition of bankrupts, it being but a mere temporary custody till Flyn and Field had an opportunity of shipping it off to Ireland; and they are entitled to two-thirds of the far.

27 Jan. 1749, cor. Hardw. C. cum Aflist.

Sir M. Ryall & al. Assignees, v. Rolle, Executor,

1 Atk. 165 to 185.

1 Ves. 348. 375.

Vide Cooke's B. L. 4 edit.

339 to 342.

In this case the court seems to have gone very fully into the doctrine of pledges. See this book, tit. Pawn.

39. Upon the construction of 21 Jac. 1. c. 19. §. 11. it was determined, that if a person advances money upon a conditional sale of goods, and does not insist upon the delivery thereof, he confides in the credit of the vendor, and not on any real or particular security, and ought to come in under a commission of bankruptcy against the vendor as much as any other person that places a confidence in the bankrupt personally.

S. C. The general view of the provision of 21 Jac. 1. is to prevent traders from gaining a delusive credit from a false appearance of their circumstances.

S. C. The stat. 21 Jac. 1. c. 19. extends to conditional as well as absolute sales.

* If the court should make a different determination, it would be contrary to the case of Stevens and Sole, determined by Lord Talbot, and to Buckland and Royston by Lord Cowper, and to the implied opinion of Lord Cowper in Copeman v. Gallant. The legislature has explained the sense of the clause in 21 Jac. 1. c. 19. by putting the words *true owner* in opposition to *reputed owner*.

S. C. A share of the partnership trade, &c. mortgaged to a partner, must be delivered, or it is a delusive credit, and falls within the stat. 21 Jac. 1. c. 19.

If it were laid down that a share of the partnership trade, &c. mortgaged to a partner is not necessary to be delivered, it would let in all the inconveniences which were meant to be prevented by the statute.

S. C. The provisions in 21 Jac. 1. c. 19. §. 11. with respect to legal interests, must be followed as to equitable ones; *choses in action* therefore held to be within the meaning of the act, and are included in the words goods and chattels.

As to choses in action, equity ought to follow the law. It is easy to turn a legal into an equitable interest; and if parliamentary provisions as to legal interests were not to be followed as to equitable ones, it would defeat the act.

A chose in action may be assigned without a deed. Vide Howell v. M'Ivers, 4 Term Rep. 690. Cowp. 233.

Lord H. observed, this question was never carried farther than to debts contracted relative to the partnership either after the bankruptcy or death of one of the parties.

S. C. How far partnership stock is liable to the debts of partners in the first place?

Crofts v. Pyke, 1 P. Wms. 150. is a strong negative case to this purpose.

S. C. Where one partner lends money to another partner generally, and it is not entered in the partnership books, he does not gain a specific lien upon the share of the borrower.

S. C.

S. C. A person may set off a demand under the bankrupt acts, though not relative to the mutual credit between him and the bankrupt.

4 Feb. 1749, when this cause came on for further directions.

40. One *Richardson*, in 1746, purchased the office of under-marshal of the city of *London* for 900*l.* with a salary annexed to it of 60*l.*, payable half-yearly, and a freedom of the city, worth 25*l.* annually. His effects under a commission of bankruptcy not amounting to 5*s.* in the pound, the assignees applied to the lord mayor and court of aldermen for liberty to sell the bankrupt's office; but he being present in court, and refusing to consent, they declared that they could not alienate it without his consent. Application was then made to this court that the office might be forthwith sold, and that the lord mayor, &c. may be indemnified in accepting such alienation, on the assignees paying the usual alienation fine. Lord Chancellor of opinion, that assignees might by anticipation sell this office of under-marshal, and that it was not within the statute of 5 & 6 *Ed.* 6. c. 16. as it did not concern the administration of justice.

3 Aug. 1749, cor. *Hardw. C.*
Ex parte Butler and another, Assignees,
1 *Atk.* 210. 212, 213, 214, 215.
Amb. 73.
S. C. came on again, cor.
Hardw. C. 22 Dec. following.

Vide Ex parte Joynes, 20 June 1795. *Ex parte Gilbee*, 19 Nov. 1796. Joynes was a gentleman pensioner, and being a bankrupt, he was ordered to resign to the nominee of the assignees.

The office of serjeant at mace is not saleable, as it concerns the execution of justice; the same as to a sworn clerk in the Six Clerks office.

It was said to be so held in the cases of *W. Lowfield* and *Mr. Britton*, which were cited in argument.

The office of under-marshal is clearly within the description of the 34 & 35 *H.* 8. c. 4. and 13 *Eliz.* c. 7.

Stone and *Billinghurst* say, that only offices of inheritance are within the meaning of these statutes; but Lord *Hardwicke* thought the words extended to all offices.

An office *quamdiu se bene gesserit* is an office for life.

It has always been held so; and in the Scotch law is ex-

pressed as what a person holds *aut per vitam aut culpam*.

Where a bankrupt is an executor and residuary legatee, and has paid the debts, and particular legacies out of part of the assets, if he refuses to collect in the rest, notwithstanding the assignees have not the legal interest vested in them, the court would assist them to get in the remainder in the name of the executor.

If an officer of the army should become a bankrupt, the court would lay their hands upon his salary for the benefit of his creditors.

Dict. per Lord H. in S. C. Obiter only, but his lordship's opinion seems to have been overruled in *Dom. Proc.* on an ap-

peal from Scotland. *Vide also Stewart v. Tucker*, 2 *Blackst.* 1137. 1140. In re *Kennedy*, Dec. 1788, it was held that an officer's half-pay is not assignable. *Vide also Flarty v. Odium*, 3 *T. Rep.* 681. *Berwicke v. Read*, *T. Rep. C. P.* 627. *Lauderdale v. Duke of Montrose*, 4 *T. Rep.* 243. *Stone v. Lidderdale*, 2 *Anstr. Rep.* 533.

Upon *Richardson's* refusal to surrender his office, his assignees obtained an order for disposing of the same; when *B.* having agreed with the assignees for the

the

the purchase thereof at 850 *l.* on the 17th October 1749, he was presented to the court of aldermen, who approved of him, and were ready to take the bankrupt's surrender; but he again refusing, was ordered by Lord Chancellor to be committed for his contempt, and thereupon absconded. An application to the court was now made to order the court of aldermen to admit *B.* in the room of the bankrupt. Lord Chancellor said, he could not make an order upon the lord mayor, &c. to admit *B.*, as it was entirely discretionary in them, nor supply the want of a surrender; as in the common case of a copyhold, where perhaps the legal interest is in one, and the equitable interest in another, in which case the court can order the trustee to surrender, though *cestui que trust* refuses. But to the end justice might be done to the creditors, his lordship recommended it to the court of aldermen, upon the bankrupt's non-attendance, by which his office was forfeited and vacated, to dismiss him, and admit *B.* in his room, upon payment of the 850 *l.* and the alienation fine to the city chamber.

25 Nov. 1749, cor. Hardw. C.
Billon v. Hyde, 1 *Ves.* 328.
 1 *Atk.* 126.
Vide Rider v. Fowle, 3 *Lev.*
 58. *Wilson v. Boulter*, B. R.
 H. 13 Geo. 1. in *Raym.*

41. By an act of bankruptcy, all the bankrupt's real and personal estate vests in the assignees from the time it is committed, and it controls all subsequent acts of the bankrupt with regard to fairness or fraud in them; so that a sale of goods by bankrupt, after the act committed, is a sale of the property of the assignees, for which they may maintain trover. So it is as to the payment of money.

4 April 1750, cor. Hardw. C.
Ex parte Lyons, *Amb.* 89.

42. The place of Jew broker in the city of *London* is not saleable under a commission of bankruptcy.

22 Jan. 1753, cor. Hardw. C.
Ex parte Coysegame,
 1 *Atk.* 192, 193.

43. A bond given to *A.* in trust to secure the payment of an annuity of 40 *l.* during the joint lives of *E. S.* and petitioner, the bankrupt's wife; he delivers up the bond upon his last examination; she applies to the court, and prays the assignee may deliver the bond to her trustee, and that the arrears of the annuity and all future payments may be made to her. Ordered accordingly.

S. C. Where a bond is given to a trustee for the benefit of the wife, and the husband becomes a bankrupt, the assignees cannot bring an action; for by 1 *Jac.* 1. c. 15. s. 13. the assignees can only have the like remedy to recover a debt, as the bankrupt himself might have had, the word *party* in the act being meant of the bankrupt.

S. C.

S. C. The *obiter* opinion of Parker, C. J. in *Miles v. Williams & Ux.* 1 P. Wms. 255, that "*cestui que* trust being a bankrupt, his assignees may bring an action upon a trust bond in their own names, though *he* must have brought it in the name of his trustee," is denied by Lord Chancellor to be law.

44. Merchants abroad draw upon a correspondent for a particular purpose, and remit other bills to answer it; the correspondent becomes a bankrupt; those bills remaining unnegotiated must be delivered up by the assignees, or the money received thereon to the original owners.

9 Aug. 1754, cor. Hardw. C.
Ex parte Dumas, 2 Ves. 582. 535.
1 Atk. 232.

The intent of the bankrupt laws is to put all creditors upon an equality, *as to the bankrupt's estate only*: for assignees take it subject to all equities at the time of bankruptcy.

The rule of equality does not extend to matters not relating to the bankrupt's estate in law or equity.

45. An estate came to a bankrupt by descent as heir at law, after she had obtained her certificate; held it did not go to the assignees, for it was not that kind of possibility meant by the *stat.* 5 Geo. 2. c. 30.; there is no *persona designata*, and it must be a possibility that can be assigned or released, and such as she could disclose on her examination.

26 Feb. 1761, cor. M. R.
Moth v. Frome, Amb. 394.
Vide Higden v. Williamson,
3 P. Wms. 132.

46. Assignment by commissioners after the death of the bankrupt is good.

10 Nov. 1766, cor. Camden, C.
Treaghton v. Gistley, Amb. 630.
Vide Tudway v. Bourne, in
Canc. S. P. was taken for granted.

47. A trader advanced half the money for the renewal of a lease, the lessee giving a note to repay the money, unless she should by will give the estate to one of his children. She bequeathed the estate to his daughter, and the father becoming a bankrupt, a moiety of the estate vested in the assignee under 1 Jac. 1. c. 15.

T. 1782, cor. Thurlow, C.
Fryer v. Flood,
1 Bro. Cb. Ca. 160.

48. Money of the wife is by settlement to be lent to the husband, on bond, at 4 per cent., but no interest to be taken till he should decline trade, then the interest to be paid to him for life; remainder to the wife for life; remainder to the children. The husband becomes a bankrupt; the assignees are entitled to the interest during his life.

H. 1789, cor. Thurlow, C.
Stratton v. Hale,
2 Bro. Cb. Ca. 490.
Vide Osman v. Smith, MS.
case, cited. *Lockyer v. Savage*,
2 Stra. 947. *Ex parte Brown*,
14 Mar. 1788.

49. A real and personal fund was ordered to be converted into money; the produce to be paid to the wife of the bankrupt for life, without further dis-

P. 1789, cor. Thurlow, C.
Robinson v. Taylor & al.
2 Bro. Cb. Ca. 589,
Vide Miles v. Williams, 1 P.

Wms. 249. Bosvill and Brandet,
1 P. Wms. 460. Saddington
v. Kinman, 1 Bro. Ch. Ca. 44-

disposition. The third part of the personal estate (which belonged to the wife as one of the next of kin) was so vested in her, on the death of the testator, as to go to the husband's assignees, and is not a new interest arising to him upon her death.

T. 1790, cor. Thurlow, C.
Ex parte Stadgroom,
1 Ves. jun. 163.

* If at sea, it is out of the statute, if the muniments of the ship are delivered. *Vide* Bourne v. Dodson, 1 Atk. 154. Browne v. Heathcote, 1 Atk. 160. 2 Ves. 272, 622. 2 Term Rep. K. B. 462. 494. 3 T. Rep. 267. 406. 1 Bro. Ch. Ca. 126. † *Vide* Ryal v. Rowles, 1 Ves. 348. *Vide* Cooke's B. L. 4 ed. c. 8. f. 11. on the effects of the assignment on property of which a bankrupt is reputed owner.

S. C. was again argued on 2 Aug. 1790.

By 26 Geo. 3. c. 60. s. 17. the bill of sale must recite the certificate of the registry of the ship, notwithstanding the bill of sale is only intended as a security for money lent. *Vide* Rolleston v. Hibbert, 3 Term Rep. 406.

15 Dec. 1794, cor. Loughb. C.
Brandon v. Sands, 2 Ves. jun. 514.

27 Feb. 1798, cor. Loughb. C.
Pringle v. Hodgson,
3 Ves. jun. 617.

Note 3 The rule in equity seems to be, not to suffer the husband to take the wife's portion until he has made a reasonable provision for her, and the same in equity exists in regard to the assignees of

50. J. L. being indebted to petitioner for money lent, gave him a note of hand, payable on demand, and deposited with him two sixteenths of a ship, promising to execute an assignment of such shares by way of mortgage when called upon. J. L. paid petitioner a part of the debt, and then borrowed one of the bills of sale under pretence of shewing it to a purchaser. Petitioner could never get back the bill of sale. J. L. became bankrupt, and petitioner then applied to have the remaining bill of sale sold, and the produce applied in discharge of his debt. Upon this petition these questions arose, Whether shares of a ship * not at sea are within † 21 Jac. 1. c. 19. s. 10, 11. ? or, Whether transfer of a bill of sale is a sufficient delivery of possession ? Also, Whether it is affected by the registry act?—*Curia advisari vult*; and the petition stood over till 2 Aug.

Per Lord Chancellor—According to the general rule possession is to be given, but in case of assignments of shares of a ship, there seems no other way than a deposit of the bill of sale, with an undertaking to assign the same by way of mortgage. In this case it did not appear that the bankrupt ever acted as owner after the deposit. Lord Chancellor did not remember whether the operation of the registry act affected a *share* only. Ordered, that the share of the ship should be sold before the commissioners, and the money arising from the sale be applied in discharge of the petitioner's debt; and if insufficient, then that he should prove the residue under the commission.

51. The right to sue for money lost at play, given by stat. 9 Ann. c. 14. to the loser, is a vested interest, and upon his bankruptcy passes to the assignees.

52. A settlement made after marriage of stock standing in the name of the wife before and at the time of the marriage, as her fortune; the husband being insolvent at the time, and soon after becoming a bankrupt, the same was set aside as fraudulent against creditors, upon a bill by the assignees after the death of the husband. The stock

stock did not survive; but decreed to the assignees, *a bankrupt husband, who stand exactly in the husband's place. subject to a provision out of it to the widow.* *Vide Burnet and Kinafton, 2 Vern. 401. Taylor and Wheeler, 2 Vern. 564. Jacobson v. Williams, 1 P. Wms. 382.*

Assignees of a bankrupt may recover in an action against the bank, stock standing in the name of the wife. In the last case, Lord Cowper thought commissioners of bankrupt could not assign a possibility; but he was clearly wrong in point of law, for not only the latter statutes relating to bankrupts mention the word *possibility*, but 13 Elis. c. 7. f. 2. empowers the commissioners to assign all that the bankrupt might *depart with*; and, besides, the 21 Jac. 1. c. 19. enacts, that the statutes relating to creditors shall be expounded in the most beneficial manner for creditors. *Vide Higden v. Williamson, 3 P. Wms. 132.* which case (said the Master of the Rolls, in *Moth and Frome, Amb. 394.*) was the occasion of the statute of 5 Geo. 2.

Vide etiam *Moth and Frome*, where his Honour has clearly laid down, that the sort of possibility assignable by commissioners of bankrupt, and intended by 5 Geo. 2. to pass by their assignment, is such a one as can be disclosed by the bankrupt on his last examination, and where *persona designata est*. The doctrine, however, on this subject now seems clear, that equity will not interrupt the legal title of the husband to his wife's property, unless called upon by the husband or those claiming under him for its aid in respect to such property, in which case, equity will impose terms on him or them by compelling him or them to provide for the wife. *Vide Brown v. Elton, 3 P. Wms. 202.* So, if the husband become bankrupt, all such property as he could assign or release passes by the commissioner's assignment. *Vide Miles v. Williams, 1 P. Wms. 251.*; but the assignees take it subject to the same equity of providing for the wife. *Vide Bosville and Brander, 1 P. Wms. 459.*, where Mr. Cox has industriously collected all the authorities on this subject as reviewed by Lord Thurlow in *Worral and Marlur. Vide also Jewson and Moulson, post. tit. Baron and Feme, f. 10. and notes.*

As to the estate and interest of a wife, the power and Interest of a husband therein, and how far the *chofes in action* or possibilities of a wife are assignable by the commissioners under the husband's commission, see more under *Baron and Feme*.

As to the right that survives to a husband and wife, or either of them, and the cases wherein a husband or those claiming under him must provide for a wife, see more under *Baron and Feme*.

As to the copyhold estates of a bankrupt, and the cases where a defective surrender or the want of a surrender will be made good in equity in favour of creditors, see *Copyhold*.

Sec. 9. Of the Bankrupt's Surrender, Protection, and last Examination: And herein of Commitment.

1. Commissioners cannot examine a bankrupt's wife against her husband touching his bankruptcy. By the common law she cannot be a witness for or against her husband*; and though the *stat. 21 Jac. 1.* authorizes the commissioners to examine the wife touching any concealment of his goods or effects, yet neither that or 5 Geo. 1. c. 24, extends to examine the wife touching the bankruptcy of her husband, or whether he had

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committed

H. 1719, cor. Parker, C.
Ex parte Jamis, 1 P. Wms. 611.
2 *Eg. Abr.* 98. pl. 2, 3, 4.
* 1 *Inst.* 6. 2 *Vern.* 79.
12 *Vin. Abr.* 11. pl. 28.

committed an act of bankruptcy, and how and when he became bankrupt. And if the commissioners commit the bankrupt's wife for refusing to discover the goods and effects of her husband, or the time and manner of his becoming bankrupt, and keep her in prison till she shall make the last-mentioned discovery, the commitment is illegal, and she shall be discharged. Till 5 Geo. 1. c. 24. the commissioners could not examine the bankrupt himself touching his bankruptcy.

M. 1726, cor. King, C.
Anon. Sel. Ca. in Cb. 64.
2 Eq. Abr. 123. pl. 1.

2. Two persons having authority to seize the effects of a bankrupt, broke open a closet where the bankrupt was, to search for them: two officers came soon after them, and took him in an action, and threw him into the *Compter*, where he was served with several other actions in custody. Ordered, that they (*i. e.* the officers) at their own costs should procure him to be discharged, or should stand committed, *being an abuse of the process of the court.*

12 May 1742, cor. Hardw. C.
Ex parte Lingood, 1 Ark. 240.
242. 2 Eq. Abr. 99. pl. 8.

This last has of late years been granted in several instances.

3. *Lingood* being declared a bankrupt, and the three sittings at *Guildhall* advertised, the commissioners upon the examination of witnesses, in the mean time finding that he was removing and concealing his effects, summoned him to appear before them the next day from the date of the summons, and on his refusing to come, certified this fact to Mr. Justice *Chapple*, pursuant to a clause in 5 Geo. 2. who committed him to *Newgate*; and on the keeper's sending notice thereof to the commissioners, they brought him before them on their own warrant, and upon his refusing to be examined recommitted him to *Newgate*. *Lingood* petitioned to be discharged as being illegally committed. The court was of opinion, the certificate is in pursuance of the powers given to commissioners under the statutes of bankruptcy, and that where they have full evidence of his intention to secrete his effects, they may examine him in the intermediate time between the declaration of bankruptcy and the sittings at *Guildhall*.

See John Ward's case, cor. Lord King, where a commitment by commissioners was held justifiable upon mature consideration.

Where a person apprehends he is aggrieved by a commitment of commissioners of bankrupt, the ready way is to sue out a *habeas corpus*, that the legality thereof may be determined by the judges of the common law.

The old acts of parliament considered a bankrupt as a criminal, and commissioners might at their

Vide 13 Eliz. c. 7.

their discretion imprison him. But though the rigour of the law is taken away as to his person, the power of examining still remains, and a greater punishment is inflicted: if he does not surrender, it is *felony* without benefit of clergy.

The judge, upon the bare certificate of commissioners that a bankrupt refused to attend, though the cause of summoning was not mentioned, is obliged to commit him.

Lord Chancellor in this case dismissed so much of the bankrupt's petition as prayed to be discharged from his confinement; and as to so much as prayed further time to make his discovery, Lord Chancellor granted him the forty-nine days.

Such is the present practice.
Vide Cooke's B. L. 4 edit, 107.

4. The attendance of the bankrupt on the assignees to assist them in making out the accounts of his estate is confined by 5 *Geo. 2.* to the forty-two days, or the enlarged time at most; but if the assignees will undertake, for the creditors who had proved their debts under the commission, that they shall not arrest him, the court will order him to attend, notwithstanding any risk he may run from the creditors at large.

22 June 1742, cor. Hardw. C.
Ex parte Turner, 1 Atk. 148.

Lord Hardwicke said, the clauses in the statute relating to this matter are very darkly and obscurely penned, arising chiefly from the words *forty-two days* being thrown into the latter clause. *Vide Green, 221. 2 Burr. 1124, 5. 2 Blackst. Rep. 1188.*

5. The clerk of the commission caused the bankrupt to be arrested at the suit of *J.* the petitioning creditor and assignee, in the sheriff's court of *London*, for 80*l.*, and afterwards caused another action to be brought in *B. R.* for the same sum, and kept him in custody till *J.* had an opportunity of arresting him on the *B. R.* action, and afterwards charged him with another action at the suit of one *W.* The bankrupt applied to be discharged from both actions. *J.* and *W.* directed by the court respectively to discharge him out of custody of the marshal as the same attorney was concerned in both actions.

6 Aug. 1717, cor. Hardw. C.
Ex parte Wilson, 1 Atk. 152.

S. C. A petitioning creditor cannot arrest a bankrupt, because a commission is both an action and an execution in the first instance.

6. Where a bankrupt is in execution for one debt, and the judgment creditor has another against him of a distinct nature, he may prove *this* under the commission, notwithstanding he refuses to waive his execution upon the other.

4 June 1746, cor. Hardw. C.
Ex parte Bosterell, 1 Atk. 109.

Lord H. thought this a hard case on the bankrupt.

7. *Fescie*, a sheriff's officer, and bail for the petitioner, a bankrupt, takes him away during the time of his last examination, and surrenders him

22 Oct. 1747, cor. Hardw. C.
Ex parte Gibbons, 1 Atk. 238, 9.

Upon the subject of a bankrupt's surrender and consequent

privilege, *vide* Darby v. Baughan, 5 Term Rep. 209. Kenyon v. Solomon, Cowp. 156.

This privilege extends to protect a bankrupt on an attachment for non-payment of money, as analogous to an execution or process to enforce payment of a debt. *Vide* Ex parte Parker, 3 Vef. jun. 554.

in discharge of his bail. He prays to be discharged out of custody, and that *Fecit* may be censured for a contempt of the court. Lord Chancellor inclined to think, that the bail's taking the principal coming to a court of justice to be examined has never been determined to be a contempt of court, provided they bring him to be examined by that court, and therefore dismissed the petition; but without prejudice to the bankrupt's application to the court of B. R.

S. C. The taking of a bankrupt by his bail is not a contravention of 5 Geo. 2.; for the force of the clause in that act is *arrests by creditors*, and bail are no creditors till damnified, and therefore not within the description.

S. C. In the language of the court the bail are the gaolers of the principal, and upon this notion of law they may arrest him on a *Sunday*, as he has his liberty only by the indulgence of the bail.

24 Dec. 1747, cor. Hardw. C. *Ex parte Meymott*, 1 Ark. 200.

8. If a bankrupt has an objection to a question, he must demur to the interrogatories, and the court will judge of it upon a petition; or if he refuses to answer any question, and the commissioners commit him, and the delinquent brings an *habeas corpus*, the question must be set forth particularly in the return to the *habeas corpus*, that the judges may judge whether it was lawful or not.

7 Aug. 1751, cor. Hardw. C. *Ex parte Wood*, 1 Ark. 22, 222.

9 One *Wood* applied for an order upon the commissioners to admit him a creditor for 21 l. upon a note, and that the clerk of the commission might be directed to attend at the *Old Bailey* with the proceedings upon a prosecution against the bankrupt for felony in not surrendering himself according to the directions of the act of parliament. As *Wood* had not yet proved his debt, if not made out to the satisfaction of the commissioners, it may be rejected; and Lord Chancellor said, that notwithstanding such a prosecution may be carried on by a person who is not a creditor, yet, by the words of the act of parliament, it looked as if the legislature intended there should be a concurrence of the creditors under the commission, and that as this is a penal law, a court of equity will not lend its aid to such a prosecution, by ordering the clerk to attend with the proceedings at the *Old Bailey*; and therefore he would not grant the petition.

Where

Where a bankrupt did not surrender himself in due time, if there did not appear to be any intention of defrauding his creditors, Lord *Macclesfield* in several instances superseded the commission in order to prevent *such* a prosecution.

10. A bankrupt's omission to surrender is not felony unless it is wilful.

6 April 1736, cor. Hardw. C.
Ex parte Rodgers, Amb. 307.
Vide Ex parte Sherman; Fm

parte Smith, 1 Mar. 1785; Ex parte Grey, 1 Ves. jun. 195.

11. Bankrupt's petition for a meeting to take his surrender, he having gone abroad, where (he swore) he was detained by illness, dismissed, it being sworn on the other side that he was apparently well. Lord Chancellor thought the bankrupt kept purposely out of the way, and that he was perjured by his affidavit in support of the petition.

H. 1786, cor. Thurlow, C.
Ex parte White,
2 Bro. Ch. Ca. 47.

12. Bankrupt's petition for a meeting to take his surrender, the bankrupt having been prevented from surrendering by illness, allowed.

H. 1786, cor. Thurlow, C.
Ex parte Bould,
2 Bro. Ch. Ca. 49.

13. Petition to appoint a meeting for bankrupt's surrender and examination, after the commissioners had been dissatisfied with former answers, allowed. The estate to bear the costs, for the bankrupt has no estate.

H. 1786, cor. Thurlow, C.
Ex parte Graham,
2 Bro. Ch. Ca. 48.

14. Bankrupt was prevented from surrendering, because the commissioners did not attend at the day; on petition of the commissioners another day was appointed. The court blamed their conduct, and said, the petition ought to have been by the bankrupt.

T. 1790, cor. Thurlow, C.
Ex parte Grey, 1 Ves. jun. 195.

15. A bankrupt like a pauper loses his privilege by misconduct; therefore where after two petitions dismissed, he presents a third for the same purpose, it will be dismissed with costs; and if not able to pay them, he must be committed; but the court will not make an order to restrain him from presenting any more.

21 Dec. 1792, cor. Lds. Comrs.
Ex parte Sharpe, 2 Ves. jun. 40.
Vide Lock v. Bromley, 3 Ves.
jun. 40. et post, sec. 11. pl. 39.

16. The privilege of a bankrupt from arrests during his examination extends to an attachment for not paying money under an award, made a rule of court, as analogous to an execution or process to enforce payment of a debt.

16 Aug. 1797, cor. Loughb. C.
Ex parte Parker, 3 Ves. jun. 554.

Sec. 10. Of the Dividend.

T. 1690, cor. Lds. Comrs.
Huckox & al. v. Sedgewick,
 2 Vern. 162.

1. Commissioners ordered a distribution to be made among creditors, when the bankrupt's estate was not sold, and the assignees had not in fact any money in hand. Lord *Jeffries* set aside this order of distribution as fraudulent, and in exclusion of other creditors. Lords Commissioners thought the Lord Chancellor had done well, and that such a colourable distribution might be set aside even upon petition.

H. 1740, cor. Hardw. C.
 cited as a case put in *Smith v.*
Duke of Chandos, Barnard. 417.
 2 Atk. 151. 159. S. C. but not
 S. P.

2 Eq. Abr. 103. pl. 11.
 100. pl. 8. 118. pl. 9.

This case wholly depends upon the order of distribution made by the commissioners allocating the dividend; for if no such order of distribution had been made, the creditor would have been allowed to come in under the bankrupt's estate, and would not have been confined to his remedy against the assignees.

2. Commissioners of bankrupt appoint a dividend to be made of the bankrupt's estate; a creditor under the commission neglects to receive of the assignees his proportion of that dividend; the assignees afterwards break, and run away with the dividend that was in their hands; the creditor shall not be allowed to come upon the bankrupt's estate for that money, but must take his remedy against the assignees as well as he can.

1 April 1742, cor. Hardw. C.
Ex parte White, 1 Atk. 90.

3. An assignee cannot stop a person's share in a dividend on account of his own private debt owing to him from that person.

13 Aug. 1742, cor. Hardw. C.
Ex parte Whitcomb, 1 Atk. 91.

4. Commissioners may order a dividend to be advertised, if they think it proper for the assignees to make one.

25 Oct. 1745, cor. Hardw. C.
Ex parte Kirk, 1 Atk. 108.

Lord Hardwicke compared this to the case of a bond assigned by a person before he becomes bankrupt, which is good in equity, and the assignee is entitled to retain the bond against the creditors under the commission.

5. B. a creditor under a commission being indebted to H. in 79*l.*, draws on the assignee for that sum, payable to H. or order, out of B.'s share of the dividend to be made. The assignee accepts it by parol, but, before any dividend, becomes a bankrupt himself. H. is entitled to the whole 79*l.*, and is not obliged to come in *pro rata* only under the commission against the assignee.

11 April 1747, cor. Hardw. C.
Ex parte Grove, 1 Atk. 104.

6. A creditor after he has received a dividend under a commission will be allowed to bring an action at law for his debt, upon refunding that dividend.

2 Feb. 1748, cor. Hardw. C.
Ex parte Styles and another,
 1 Atk. 209.

7. Upon an affidavit of a creditor that he has not read the *Gazette*, he will be admitted to prove his debt, so as not to disturb a former dividend; nor can commissioners proceed to make a second, till

till he is brought up equal to the creditors under the first dividend.

8. Two debtors, one becomes a bankrupt; the creditor proves his whole debt, but before dividend receives a composition from the other: he shall still be entitled to a dividend in proportion to the whole.

Otherwise, if he received the composition before the bankruptcy.

9. *B. M.*, in pursuance of articles before marriage with the petitioner, executed a bond to *T. M.* and *W. R.*, trustees under the articles in the penalty of 1000*l.*, conditioned to be void if the heirs, &c. of *B. M.* should pay to *T. M.* and *W. R.* 500*l.* within three months next after the death of *B. M.*, for the use of the petitioner; or in case she should not survive, to the use of her child or children, if any. A commission of bankruptcy issued against *B. M.*, who dies on the 1st April 1749. On the 28th of the same month a dividend is made of 9*s.* in the pound; the petitioner prayed to be paid a proportionable dividend. The assignees being served with notice, and *no counsel attending for them*, the court directed she should be admitted a creditor, and receive a dividend of 9*s.* in the pound, *not being opposed*.

A judgment would have made it an immediate debt, and she would have been entitled to have come in as a claimant before her husband's death, and the assignees must then have retained sufficient on a dividend day to answer a proportionable dividend to the petitioner when the event happened.

Lord Chancellor King's being an *obiter* opinion as to a *wife's being admitted to a dividend*, and Lord Talbot doubted of it, and the present Chancellor in a case *Ex parte Groome*, December 1741, refusing to admit such a person creditor, his lordship would not suffer the secretary to draw up the order pronounced at a former day of petitions, though not defended, but recommended it to the assignees to compromise it with the petitioner.

10. *G.* drew a great number of bills payable to *V.* and *A.* upon *H.*, who had no effects of *G.*'s in his hands, but accepted them for the honour of the drawer. *G.* becomes a bankrupt, and *H.* by means of the great sums he paid on account of such acceptance, becomes a bankrupt likewise.

R 4

The

20 Dec. 1750, cor. Hardw. C.
Ex parte Wildman, 1 Atk. 109.
2 Vef. 113.

23 Dec. 1751, cor. Hardw. C.
Ex parte Eliz. Mitchell,
1 Atk. 120, 121.
Ex parte Caswell, 2 P.Wms. 497.
Ex parte Greenaway, 1 Atk. 113.

Lord Hardwicke said, that his opinion *casu Ex parte Groome* was founded on Tully and Sparks in *B. R.* and that the only difference between the principal case and *Ex parte Groome* was, that *Groome's* case was on contract and this upon bond.

22 Jan. 1752, S. C. 1214

21 Dec. 1752, cor. Hardw. C.
Ex parte Marshal and others,
1 Atk. 129, 130.

This equity of the surety to stand in the place of the principal creditor, is so far qualified that he is not entitled to a dividend from the bankrupt fund, to the

prejudice of any other debt the principal creditor may have against the bankrupt's estate. *Ex parte Turner*, 3 Vef. jun. 243.

The bill-holders prove under both commissions, and receive dividends, but not sufficient to pay 20 s. in the pound. *The assignees of H* petition to stand in the place of *bill-holders*, *pro tanto* as they had received under *H*'s commission against the estate of *G*. Ordered, that they should, *pro tanto*, as *H*'s estate had paid on account of his acceptance of the said bills, but not to receive any dividend from *G*'s estate till the *bill-holders* had received a full satisfaction for their debts.

M. 1785, cor. Thurlow, C.

Ex parte Hodgson,

2 Bro. Ch. Ca. 5.

T. 1786, cor. Thurlow.

Ex parte Page and others,

2 Bro. Ch. Ca. 119.

T. 1786.

Ex parte Flintum *, 2 Bro. Ch. Ca. 120.

* Lord Chancellor said, he thought the point was settled that joint creditors might prove under separate commissions, especially since the case *Ex parte Crisp*, 1 Atk. 133. which had decided that joint creditors might sue out a separate commission.

H. 1786, cor. Thurlow, C.

Ex parte Long, 2 Bro. Ch. Ca. 50.

Vide Ex parte eachy, 1 Atk. 111.

And it is the practice, without an order, to permit creditors to prove at a meeting to declare a dividend, and bring them up, equal with those who have proved before, and then to direct a general distribution of the residue. *Vide Cooke's B. L.* 4 ed. 531.

11. Joint creditors admitted to prove and take dividends under a separate commission against *one* partner, but after a dividend to be let in to take future dividends, only not disturb the dividends already made.

12. If creditors have not been able to prove their debts in time to receive a first dividend, they will still be admitted to prove their debts if they can reasonably account for the delay so as not to disturb any former dividend; and upon obtaining *an order for that purpose*, they must in the first place be brought up equal to the creditors under the former dividends before the commissioners can proceed to make another.

M. 1789, cor. Thurlow, C.

Ex parte Smith,

3 Bro. Ch. Ca. 16.

13. A creditor who had obtained goods of his debtor just before his bankruptcy, shall not prove for the residue of his debt without accounting for the goods so obtained, and his share of the dividend may be retained until he gives up the property so unduly possessed.

T. 1790, cor. Thurlow, C.

Ex parte Hopkinson,

1 Vef. jun. 159.

Whether a creditor can be compelled to elect *before a dividend*, seems to be somewhat unsettled. *Vide Cooke's B. L.* 4 ed. 130.

14. A creditor having taken his remedy at law, cannot take a dividend too, but may assent or dissent as to the certificate.

T. 1790, cor. Thurlow, C.

Ex parte Guring, 1 Vef. jun. 168.

15. Assignees of a bankrupt made no dividend but thirteen years after the bankruptcy, had from the produce of the property, accumulated enough to pay 15 s. in the pound, a sale and distribution was ordered, on petition of one creditor.

Ordo Curie, 8 Mar. 1794,

per Leachborough, C.

4 Bro. Ch. Ca. 546.

16. It having been found that large sums of money remain in the hands of assignees of bankrupts

rupts to the delay of dividends and the prejudice of creditors, *ordered*, that in every commission of bankrupt where the major part in value of the creditors present at the choice of assignees do not give directions where to place the bankrupt's monies, pursuant to the statute of 5 Geo. 2. the assignees shall pay all monies received by them into the Bank as often as the same shall amount to 100*l.*, there to remain until a dividend; and in the assignment from the commissioners to the assignees, a covenant to be inserted on the part of the assignees to pay such monies, conformably to the directions of the creditors under the statute, or to this order. And it being found that assignees neglect to comply with the directions of the said act in making a first dividend at the end of four months and within twelve months, and a second dividend within eighteen months from the issuing of the commission, *ordered*, that in cases where it appears the directions of the said act have not been complied with, the commissioners do cause due notice to be given in the *Gazette* and other public papers for the assignees to attend them, and shew cause why such dividend or dividends have not been made; and if the assignees do not shew satisfactory cause to the commissioners, *ordered*, that the commissioners do appoint a time and place to make such dividend or dividends, and to give due notice of such meeting.

17. After judgment by default in an action upon a dividend under a commission of bankruptcy, the assignees filed a bill for discovery, and to have the proof of the debt expunged. Demurrer allowed, the course being by petition.

T. 1795, cor. Loughb. C.
Clarke v. Capron, 2 Ves. jun. 666.

18. Upon petition of joint creditors to be admitted to prove under a separate commission, it was ordered, that they should be admitted, but not to receive a dividend; and that the dividend shall be reserved till an account is taken of what they have or might have received from the partnership effects.

T. 1796, cor. Loughb. C.
Ex parte Elton,
3 Ves. jun. 238. 240.

Separate creditors cannot take a dividend upon the joint estate rateably with the joint creditors; each estate is applicable to its own debts.

19. Accommodation-bills upon the bankruptcy of the drawer were fully paid by the acceptors to the holder; who having a farther demand under the commission proved for the whole including the bills,

T. 1796, cor. Loughb. C.
Ex parte Turner, 1 Ves. jun. 243.

bills, he may take out of the dividend upon the bills the proportion he would have received upon the residue of his debt beyond the bills, if the debt for the bills had been expunged; the rest of the dividend on the bills belongs to the acceptor.

Sec. 11. Of the Certificate of a Bankrupt; And herein of his Allowance.

T. 1715, cor. Cowper, C.
Ex parte Goodwin,
2 Vern. 696, 7.

Vide Bailey v. Robinson,
T. 6 Ann. in B. R.

M. 1717, cor. Cowper, C.
Bagshall v. Gore,
2 Eq. Abr. 124. pl. 1.
7 Vin. Abr. 131. pl. 5.
The statutes of bankrupt do not bind the crown: so held *per Cur.* M. 1725, in the case of *Rex v. Pixley*, in Scacc. Bunb. 202.

Vide 4 & 5 Anne, c. 17.
5 Geo. 2. c. 30. f. 7. *Vide*
7 Geo. 1. c. 31. as to bankrupts discharged from debts payable at a future day.

M. 1717, cor. Cowper, C.
Jacobson and another v. Williams,
1 P. Wms. 382, 385, 386.

P. 1720, cor. Parker, C.
Lewis v. Chase, 1 P. Wms. 620.
2 Eq. Abr. 125. pl. 5. 185. pl. 5.
The authority of this case is contradicted expressly *per Cur.* C. B. in *Summer v. Brady*, 1 Term Rep. C. B. 647.; and indeed it seems inconsistent with the spirit of many other cases, as *Middleton v. Lord Onslow*, 1 P. Wms. 768. *Spurrett v. Spiller*, 1 Atk. 105. *Smith v. Bromley*, Dougl. 3d edit. 696. *Jones v. Barkley*, ib. *Cockshott v. Bennett*, 2 Term Rep. 763.

T. 1720, cor. Parker, C.
Burdock's case,
2 Eq. Abr. 125. pl. 6.
7 Vin. Abr. 132. pl. 9.

1. IF a bankrupt having his certificate allowed has slipped the time of pleading it at law to an action for a debt precedent to the bankruptcy, equity will not relieve him.

If a bankrupt is taken in execution pending a reference of his certificate to the judges, the court will not discharge him, but put him to his *audita querela*.

2. G. brought an action for rent against B. a bankrupt, and obtained judgment before bankrupt's certificate allowed, which not being allowed till after the rule for pleading was out, the bankrupt had no opportunity to plead it, and take the benefit of the act 4 & 5 Ann. c. 17. But in the *sci. fa.* against the bail the certificate was pleaded, and plea over-ruled, so that the bankrupt had no relief but in equity, or by *audita querela*, which is an equitable remedy at law. On a motion for an injunction, Cowper, C. refused to grant one, (though urged that there were several precedents of this sort, but none ready to produce,) because this was a merciful law made in favour of bankrupts, and in prejudice of creditors; ergo, not to be extended in equity further than at law.

3. Commissioners after assigning bankrupt's effects, and giving him his certificate and discharge, cannot make a second assignment.

4. Equity will not relieve against a bond given by a bankrupt to a creditor in consideration of his withdrawing his petition against the certificate.

5. A question arose concerning the form of certificates on the late act; and *per Parker, C.* the commissioners are to certify one day that the bankrupt

rupt hath in all things conformed, &c. and then the next day the creditors certify on the same parchment their consent, at the foot of which the commissioners are to certify that the creditors had consented according to the terms of the act.

Vide 5 Geo. 2. which takes in all the other acts relating to bankrupts' certificates.

6. Where a bankrupt after certificate allowed is sued for a debt accrued before his bankruptcy, the court on the circumstances of the case will relieve, though it will not relieve on a matter purely of mispleading.

T. 1722, cor. Macclesfield, C. *Blackball v. Combs*, 2 P. Wms. 70. 2 Eq. Abr. 125. pl. 7. *Vide* 2 Vern. 696. 325. 1 Vern. 119. accord. 2 Vern. 147. cont. Co. of Gainsboro. v. Giffard, 2 P. Wms. 424.

7. A creditor coming in under a commission of bankruptcy though only to prove his debt, and oppose the bankrupt's certificate, shall not sue the bankrupt at law, unless he will waive all benefit of the commission, not only as to dividends, but as to his voting against the bankrupt's gaining his certificate.

M. 1726, Canc. *Anon.* 2 P. Wms. 394. It is now settled that although the creditor elect to proceed at law, he may still come in under the commission and prove his debt for the purpose of assenting to or dissenting from the certificate. *Vide* Ex parte Capot, 1 Atk. 219. Ex parte Lindsey, 1 Atk. 220.

8. A bankrupt cannot plead his certificate to an action brought on a bond, bearing date before his bankruptcy, payable on a contingency which did not happen till after his certificate.

M. 1728, cor. King, C. *Ex parte Gazelet*, Mos. 28. 79. This is the same case as *Caswell, Gazelet, and Bateman*, 2 P. Wms. 497. ante, l. 5. pl. 18.

Such a bond would be barred by the bankrupt's certificate, which Lord King said could not be if the obligee is careful in declaring upon his bond. Indeed, if the party declares upon the bond only, he shall be barred. *Secus* if he sets forth as well the condition as the bond in the declaration, for then it must appear that the cause of action did not accrue at the time of the obligor's becoming a bankrupt. In *Ex parte Groome*, 1 Atk. 118. Lord Hardwicke said, that Lord King's opinion in this case was *obiter* only. Lord Talbot doubted it, and Lord Hardwicke differed from him entirely. *Sed vide* *Allop and Price*, 1 Dougl. 160. 3d edit.

It was objected in this case that Lord King said could not be if the obligee is careful in declaring upon his bond. Indeed, if the party declares upon the bond only, he shall be barred. *Secus* if he sets forth as well the condition as the bond in the declaration, for then it must appear that the cause of action did not accrue at the time of the obligor's becoming a bankrupt. In *Ex parte Groome*, 1 Atk. 118. Lord Hardwicke said, that Lord King's opinion in this case was *obiter* only. Lord Talbot doubted it, and Lord Hardwicke differed from him entirely. *Sed vide* *Allop and Price*, 1 Dougl. 160. 3d edit.

9. On a joint commission against two partners bankrupts, the separate creditors, though they have taken out separate commissions, shall yet be at liberty to come in to oppose the allowance of the certificate.

H. 1729, cor. King, C. *Horsley's case*, 3 P. Wms. 23, 24. 2 Eq. Abr. 110. pl. 4. 126. pl. 9, 10. *Fitzgib.* 283. *Vide* Ex parte Yale, 3 July 1721. Ex parte Cook, 2 P. Wms. 500. Mos. 80. *Wickes v. Strahan*, 2 Stra. 1157. *Twiss v. Massey*, 1 Atk. 67. In re *Simpson's*, 1 Atk. 138. Ex parte *Rowlandson*, 2 P. Wms. 405. *Hankey v. Garret*, 3 Bro. Ch. Rep. 457.

Where two partners are bankrupts, and a joint commission is taken out against them, if they obtain an allowance of their certificate this will bar as well their separate as their joint debts, and so *vice versa*.

Vide Cooke's B. L. 4 ed. chap. 10. sec. 5.

10. F. having proved his debt of 2000 l. under L.'s commission, and paid contribution, and yet had L. in execution for his debt, it was ordered by the late Lord Chancellor that F. should either discharge L., or lose his dividend; and commissioners having certified that four-fifths in number, &c. had consented to L.'s discharge, exclusive of F., he now petitioned

T. 1724, cor. Talbot, C. *Ex parte Fenwick*, 2 Eq. Abr. 128. pl. 16. 7 Vin. Abr. 134. pl. 20. Settled on great debate that a creditor is at liberty to elect to proceed at law, and notwithstanding may assent or dissent to the certificate. The case of putting

creditor to election is but modern in favour of bankrupts; but if that election is made in general terms, and in consequence the creditor is to be excluded from a liberty of dissenting to the certificate the rest of the creditors are not only to take all the rest of the effects, but have it in their power, by allowing the certificate, to bar the other's debt; so that permitting such creditor to assent or dissent to the certificate, is not to give him a benefit, but to prevent his being hurt. And the late statute (5 Geo. 2. c. 30. §. 10.) mentions *four-fifths of creditors who shall have proved their debts, and not who proved, &c. and sought relief*; and it would be hard to put it in the power of a few small creditors, by consenting to the certificate, to preclude the other of his debt: and therefore as the court, by equitable construction, puts a creditor to his election of abiding by his remedy at law, or coming in to have his dividend under the commission; so, by the same rule of equity, such creditor, renouncing any benefit under the commission, should not be hurt. *Per Lord Chancellor, ibid.*

petitioned against allowing of the certificate, and that he might be admitted to come in so far under the commission as to have liberty to assent or dissent.

M. 1734, cor. Talbot, C.
Ex parte Hovey,
 2 Eq. Abr. 127. pl. 15.
 7 Vin. Abr. 134. pl. 19.

11. A bankrupt in prison on a *mesne* process at the suit of A., prayed that A. might make election whether he would come in under the commission, or take his remedy at law. *Per Lord Chancellor.*—A. may take a special election, to take his remedy at law, and to come in under the commission, so far as to prove his debt and assent or dissent to certificate, because that will (not)* affect his remedy at law, but he is to waive any dividend or further benefit under the commission; and A. accordingly made his election.

* The word *not* is not in the original.

23 Mar. 1717, cor. Hardw. C.
Twiss v. Massey, 1 Atk. 67.
Vide 2 Ve. 26. 327. 383,
 389. 407.

12. If a bankrupt has his certificate under a joint commission, it discharges him from all debts separate as well as joint.

4 April 1739, cor. Hardw. C.
Ex parte Capot, 1 Atk. 220.

13. The reason why such creditor as elects to proceed at law shall still be allowed to assent or dissent to the bankrupt's certificate is to make his remedy against the person effectual, otherwise the other creditors may deprive him of his elected remedy.

23 Jan. 1741, cor. Hardw. C.
Ex parte Fyddell, 1 Atk. 73.

14. The certificate of a bankrupt being stayed upon the petition of a claimant under the commission who suggested fraud and collusion between the bankrupt and his son. At a meeting of the commissioners to examine into this matter, several new creditors came in and proved their debts; but as they did not join in a petition to set aside the certificate as fraudulently obtained, the court would not delay the allowance thereof, but left the claimant to bring a bill if he thought proper.

24 Aug. 1742, cor. Hardw. C.
Ex parte Turner, 1 Atk. 97.
 Lord H. laid this down as a rule.

15. Where there is both a joint and separate commission, a creditor under the joint may come under the separate, and assent or dissent to the certificate under the separate commission.

16. A

16. A certificate in the lifetime of the bankrupt, although not confirmed by Lord Chancellor until after his death, is good; for the operative force of it arises from the consent of the creditors, and when confirmed, has its effect from the beginning.

2 Burr. 718. 2 Blackst. Rep. 811. And why not a certificate?—

4 Nov. 1743, cor. Hardw. C.
Bremley and others v. Gooders,
Assignee, and others,
1 Atk. 77. 79.

On the demise of the king *
a commission may be renewed,
though the bankrupt be dead.
* Vide 5 Geo. 2. c. 30. s. 45.

A certificate discharges the person of the bankrupt and his estate subsequently accrued, but not the estate in the hands of the assignees.

17. A bankrupt is not entitled to his allowance until a final dividend is made, nor even then unless he has had his certificate.

20 Oct. 1744, cor. Hardw. C.
Ex parte Grier, 1 Atk. 207.
Vide Groome v. Potts,
6 T. Rep. 548.

18. Where four parts in five in number and value of the creditors of a bankrupt have signed his certificate, the court will not stay it on petition of persons whose demands on the bankrupt's estate depend on an account to be taken in their favour, and who do not swear to a balance due.

22 Jan. 1745, cor. Hardw. C.
Ex parte Johnson and others,
1 Atk. 81.
Vide 18 Geo. 3. c. 52. s. 76.

19. Notwithstanding a creditor under a commission of bankruptcy elects to proceed at law, he may still assent or dissent to the certificate.

26 Oct. 1745, cor. Hardw. C.
Ex parte Lindsey, 1 Atk. 220.

20. A bankrupt, though he has conformed in every respect to the acts relating to bankruptcy, cannot be discharged from a commitment under an extent of the crown.

26 Oct. 1745, cor. Hardw. C.
Anon. 1 Atk. 262.
The statutes of bankrupts do
not bind the crown.

21. Where a person discharged by the insolvent debtors' act becomes a bankrupt, afterwards his certificate must be special, and will be allowed only as a discharge of his person, but not of his future estate and effects.

7 Aug. 1746, cor. Hardw. C.
Ex parte Green, 1 Atk. 257.

22. A bankrupt's allowance under the act of parliament is a vested interest, and if he dies will go to his representative.

24 Dec. 1747, cor. Hardw. C.
Ex parte Trap, 1 Atk. 208.
Ex parte Catcott, 3 Atk. 814. S.P.

23. Bankrupts are not entitled to their allowance under the 5 Geo. 2. till a final dividend is made; for it cannot be seen before whether they will be entitled to any allowance at all.

2 Feb. 1748, cor. Hardw. C.
Ex parte Stiles and Pickart,
1 Atk. 208.
Nor until the certificate is obtained. *Vide Ex parte Grier,*
1 Atk. 207.

24. Certificates are matters of judgment, and a *mandamus* would not lie to compel an allowance of it; for it is discretionary in the commissioners first, and in the Lord Chancellor afterwards.

26 Mar. 1750, cor. Hardw. C.
Ex parte Williamson,
1 Atk. 82, 83, 84.

Where a bankrupt is a trader in Ireland, signing his certificate in three months after the commission issues

issues

issues is too precipitate, and the Lord Chancellor stopped it on this account.

S. C. *post*, pl. 27. from Vesey's Report.

S. C. Unless a person proves a debt, or shews a reasonable ground for a claim, he is not within the rule for assenting or dissenting to the certificate.

S. C. The allowance of a bankrupt's certificate will not discharge his sureties, but they may be proceeded against notwithstanding such allowance.

28 Mar. 1751, cor. Hardw. C.
Ex parte Leaverland, 1 Atk. 145.

25. After two dividends, the creditors release the bankrupt of all further demands. He petitions to supersede the commission, and for liberty to collect in the debts still due to the estate. The bankrupt admitted to stand in the place of the assignees to get in the remainder of the debts; but Lord Chancellor would not supersede the commission for the sake of the bankrupt, as it would entirely defeat his certificate.

7 Aug. 1751, cor. Hardw. C.
Ex parte Derwilliers, 1 Atk. 221.

26. Where a person *chooses himself* an assignee, it is doubtful whether this is not making an election to proceed under the commission; but on the assignees electing in court to proceed at law, his lordship made an order that he should be discharged as a creditor under the commission, but still be allowed to assent or dissent to the certificate.

25 Nov. 1751, cor. Hardw. C.
Ex parte Williamson, 2 Ves. 249.

27. A bankrupt's certificate allowed, notwithstanding a suspicion in the court of the view in taking out the commission.

S. C. *ante*, pl. 24. from Atkin's Rep.

The form of granting a certificate is matter of judgment; but not arbitrarily to be disallowed, if the requisites are complied with, unless there has been fraud or concealment.

21 Dec. 1752, cor. Hardw. C.
In re Simpson's, 1 Atk. 138.

28. Upon the application of joint creditors to be admitted to prove their debts under a separate commission. Ordered, *provisionally*, that they shall be admitted creditors, and assent or dissent to the bankrupt's certificate, because it would otherwise clear him of the debts of joint creditors as well as separate.

21 Dec. 1753, cor. Hardw. C.
Anon., 1 Atk. 84.

29. The commission issued 10th September, and the certificate was signed the 30th November following. Such a hasty proceeding is contrary to the intention of the statutes of bankruptcy which were made in favour of creditors, but are too often abused for the service of insolvent persons. The certificate therefore ordered to be stayed.

30. A person who has a debt in his own right, another as executor, cannot sign a certificate in two distinct capacities.

2 Nov. 1754, cor. Hardw. C.
Ex parte de Saujmareu,
1 Atk. 85, 86, 87.
Vide Green, 239.

S. C. The clause in 5 Geo. 2. by which a bankrupt is excepted from the benefit of this act, who hath upon marriage of any one of his children given above the value of 100*l.*, unless he hath sufficient to satisfy all his creditors, must be construed strictly, being a penal one, and not extended further than children of a bankrupt.

S. C. The certificate being signed upon the same day with the bankrupt's last examination, and two-thirds of the creditors living in *Guernsey*, the allowance upon their petition was stayed for these reasons.

In this case it appeared also, that the creditors who had signed the certificate amounted in number to eleven only, and their debts were in the whole 22,000*l.*, among which one person had signed four times as nephew and guardian.

The *Guernsey* debts were 35,000*l.*, and was for money remitted to the bankrupt to be invested in the public funds.

S. C. Formerly the judges had the cognizance of certificates, but being found inconvenient, the great seal has taken it to itself.

Vide Green, 172. 2 Vef. 489.
585. 633.

31. The representative of a bankrupt, who had in his lifetime divided 10*s.* in the pound, is, as standing in his place, entitled to the allowance.

2 Nov. 1754, cor. Hardw. C.
Ex parte Calcot & al.
1 Atk. 209. 3 Atk. 814.
Vide Ex parte Trap,
1 Atk. 208. S. P.

32. An estate to a bankrupt by descent as heir at law, after she had obtained her certificate, held it did not go to the assignees, for it was not that kind of possibility meant by the *stat. 5 Geo. 2. c. 30.*; there is no *persona designata*, and it must be a possibility that can be assigned or released, and such as she could disclose on her examination.

26 Feb. 1761, cor. M. R.
Moth v. Frome, Amb. 394.
Vide Higden v. Williamson,
3 P. Wms. 132.

33. Bankrupt partners, paying different proportions towards the debts, shall have but one allowance, which shall be divided between them in the proportions their respective estates have paid.

T. 1785, cor. Thurlow, C.
Ex parte Bate,
1 Bro. Ch. Ca. 452.

34. Petition by a creditor to stay certificate that he might prove a debt, not accounting for not having applied before, dismissed.

H. 1786, cor. Thurlow, C.
Ex parte Adams,
2 Bro. Ch. Ca. 48.
Vide Ex parte Williamson,

1 Atk. 83. where Lord Hardwicke said he would not lock up certificates for ever, and deprive a man of the liberty the law had given him.

35. A creditor was admitted to prove his costs, taxed after commission, on a verdict obtained before; the costs having a relation back to the verdict, and consequently the bankrupt's certificate will be a good bar.

M. 1789, cor. Thurlow, C.
Ex parte Simpson,
3 Bro. Ch. Ca. 46.
Vide Lewis v. Piercy,
Term Rep. C. B. 29.

P. 1790, cor. Thurlow, C.
Ex parte Morris,
 3 Bro. Cb. Ca. 79.
 1 Ves. jun. 132.

Vide Bromley v. Goodere, 1 Atk. 75.

T. 1790, cor. Thurlow, C.
Ex parte Hopkinson,
 1 Ves. jun. 159.

The point seems to be unsettled even by this late case, whether a creditor can be compelled to elect before a dividend. Several modern determinations, supported by some of an earlier date, have put the creditor to his election before a dividend, provided the application was not made before a reasonable time had elapsed for the creditor to inform himself of the bankrupt's affairs.—In January 1789, *Ex parte Robertson*, Lord Thurlow would not lay it down as a general rule that there must be a dividend declared first, because it might not be the fault of the bankrupt; but he should expect the bankrupt to shew that it was not his fault.

M. 1794, in Scacc.
Silly v. Crew & al. Assignees,
 2 Anst. 504.

17 Feb. 1796, cor. M. R.
Lack v. Bromley, 3 Ves. jun. 40.
Vide Ex parte Shawe, 2 Ves.
 jun. 40. et ante, f. 9. pl. 15.

36. A bankrupt's estate shall pay interest when sufficient, without breaking in upon his allowance.

37. A creditor, having taken his remedy at law, cannot take a dividend too, but may assent or dissent as to the certificate.

38. The assignees, signing the certificate of a bankrupt, and getting a release from him, in order to produce him as a witness to prove a debt to his estate, is a fair transaction.

39. Costs were given personally against an uncertificated bankrupt in a case of fraud and misconduct.

Sec. 12. In what Cases a Creditor shall or shall not refund Property assigned to or received by him before the issuing of the Commission.

M. 1682, cor. Finch, C.
Noel v. Robinson, 1 Vern. 94.
 Dict. only of Lord Chancellor.

1. A Voluntary payment to a bankrupt not good, but otherwise if recovered by course of law.

M. 1682, cor. Finch, C.
Wagstaff v. Bedford, 1 Vern. 95.
 2 Vent. 358.

1 Eq. Abr. 6. pl. 5.
Vide Anon. 1 Vern. 135. and
Potts and Potts, 1 Vern. 208.
 where it was held sufficient that
 the servant should have accounted with his master. *Quare ergo*, If in the principal case there were not
 some circumstances of fraud or a combination between the bankrupt and his servant?

2. Bill for an account of money received for one who became a bankrupt. Defendant pleaded he received the money as a menial servant to the bankrupt, and had accounted with him for it. Plea over-ruled.

T. 1716, Cane.
Crosby's case,
 7 Vin. Abr. 69. pl. 6.
 2 Eq. Abr. 104. pl. 2.

3. If a man trade with a bankrupt between the act of bankruptcy and the commission sued out, whether by delivery of goods or payment of money, without notice of the act of bankruptcy, the bankrupt keeping open trade, such person shall come in as a creditor.

M. 1727, cor. M. R.
Small v. Oudley and others,
 2 P. Wms. 427. 420, 430, 431.
 2 Eq. Abr. 122. pl. 2.

4. A goldsmith after shutting up his shop (being greatly indebted) assigned his share of a partnership stock

stock in the wine trade to J. S., being a particular creditor, to secure his debt, but without the knowledge of J. S., and becomes bankrupt the very next day; J. S. brings a bill to have the benefit of this assignment, and decreed for him.

S. C. There may be reason for a bankrupt to prefer one creditor to another.

S. C. The time when the assignment was made is not material, so as it be before the bankruptcy; but the justness of the debt is material.

S. C. No objection that the assignment was made by the trader without notice to the creditor, for this shews it was without his importunity.

S. C. But if the assignment had been of the bankrupt's whole estate or stock in trade as a goldsmith, it would have been void.

Vide Cock v. Goodfellow, 10 Mod. 489. Jacob and Shepherd, stated at length by Lord Mansfield, 1 Burr. 480.

An assignment of all a trader's property partially, must of itself create an insolvency; for when all is gone he has not wherewith

to carry on trade. *Vide* Law v. Skinner, 2 Blackst. Rep. 996.

Every act done with a view to defeat the bankrupt laws by giving a preference among creditors, contrary to the spirit of these laws, is fraudulent, and therefore void; and if by deed, it is in itself an act of bankruptcy. *Worsley v. De Mattos*, 1 Burr. 467. *Hague v. Rolleston*, 4 Burr. 2174. *Alderson v. Temple*, 4 Burr. 2235. *Harman v. Fisher*, Cowp. 117. *Rust v. Cooper*, Cowp. 629. *Hassell v. Simpson*, 1 Bro. Ch. Rep. 99. and Dougl. 89. (n.) S. C. *Butcher v. East*, Dougl. 294. *Round v. Byde*, Cooke's B. L. 4 ed. 91. The authority of Small and Oudley (the principal case) seems somewhat shaken by *Linton and Bartlett*, 3 Will. 47. and Cowp. 124., which was a case of a bill of sale given, two days before the bankrupt absconded, to an innocent creditor, and accompanied with possession. So in *Devon and Watts*, Dougl. 86., bankrupt assigned a lease to some creditors partially just before his bankruptcy. These acts were held to be in contemplation of the bankruptcy, and adjudged void.

5. J. S. makes payment of a debt to a creditor soon after he becomes a bankrupt, and the creditor had no notice of the bankruptcy at the time he received the money; the assignees under the commission shall not be allowed to recover the money back again in an indebitatus assumpsit, but only in an action of trover, and the reason is, that they cannot insist upon having the money by way of contract, but as a tort.

M. 1740, cor. Hardw. C.

Bourne v. Dodson,

2 Eq. Abr. 102. pl. 9.

Barnard, 207. 1 Atk. 157.

There would have been a great difficulty to try this cause in trover on account of the money or bank notes. Lord Hardwicke, therefore, proposed to direct a feigned issue, but the matter was compromised, and never

went into a court of law. *Vide* Billon and Hyde,

1 Atk. 123. 1 Vef. 327. S. P.

6. Mr. Billon and one Mitchell had various transactions together, principally negotiating bills of exchange from 1742 to the 8th June 1743; and on the 18th of April 1743 Mitchell committed a private act of bankruptcy. The sums paid by Mitchell for these transactions to the plaintiff amounted to 3000 l. The assignees bring an action against Billon for so much money had and received to their use, and recovered a verdict against him for 3000 l. Billon insisted on the trial to have 712 l. allowed him as paid to and for the bankrupt; but being refused, brought a bill for the 712 l. Billon was entitled to have this allowance, and

25 Nov. 1749, cor. Hardw. C.

Billon v. Hyde and another,

1 Atk. 126-7.

Vide Ryder v. Fowle, 3 Lev. 58.

In trover by assignees the courts have leaned against a strict construction of the bankrupt acts to the prejudice of a fair creditor.

Vide Wilson v. Boulter,
Raym. S. P.

the verdict not conclusive upon him, because it is a matter of *contract* and of *account*; and in that respect a proper subject for the jurisdiction of the court of Chancery.

27 Nov. 1749, cor. Hardw. C.
Row v. Dawson, 1 *Ves.* 331.
Vide Ryal v. Rowles,
1 *Ves.* 348. 375.

7. *A.* borrows money of *B.*, and gives him a draft upon a fund due to *A.* out of the Exchequer, and becomes a bankrupt. This is an assignment of the property to *B.* for a valuable consideration, and shall prevail against the assignees under the commission of bankruptcy.

25 July 1754, cor. Hardw. C.
Hawkins v. Penfold, 2 *Ves.* 550.

8. Creditors receiving money or bills after act of bankruptcy, a good payment if no notice.

M. 1789, cor. Thurlow, C.
Ex parte Smith, 3 *Bro. Cb. Ca.* 46.

9. Creditor obtaining goods from his debtor just before bankruptcy shall not prove for the residue without accounting for the goods so obtained, and his share of the dividend may be retained until he gives up the property so unduly possessed.

23 Mar. 1796, cor. Loughb. C.
Ex parte Scudamore,
3 *Ves. jun.* 85. 88.

Vide Cooke's B. L. 4th edit. c. 4. f. 1. where the several cases on this point (*pro & con.*) are collected. Upon the general construction of all which it appears that every act done in contemplation of a bankruptcy, or with an intent to defeat the bankrupt laws, is void, and creditors who take money or securities from their debtors, with a view to be *partially* paid, must refund and deliver up their securities for the benefit of the creditors at large, it being the object of the bankrupt laws to put all creditors upon an equal footing. Acts, therefore, done by debtors which may disable them from trading in future fairly and *bonâ fide*, as partial assignment by *deed* of all their effects in preference, are in themselves acts of bankruptcy and void; and creditors who attempt to take such assignments, or any undue advantage, after an express or implied notice of the insolvency of their debtors, cannot hold their securities to the prejudice of the bankrupt's estate; but as the cases of creditors are generally deemed hard, the assignees are held to a strict proof of such notice.

10. A security made by a debtor insolvent whose effects were under execution, and not two months before his bankruptcy, upon a previous application of a creditor ignorant of those circumstances, Lord Chancellor thought it valid, but permitted the assignees to bring an action.

Delivery of effects in contemplation of bankruptcy to a *bonâ fide* creditor, is bad, if voluntary and without pressure.

Sec. 13. Of the Superfedeas.

M. 1683, cor. North, C. S.
Alderman Backwell's Creditors,
1 *Vern.* 208.

1 *Eq. Abr.* 52. pl. 3. where a quere is made if the commission may not be renewed or supersedeas revoked where the supersedeas was granted within four months after the issuing of the commission.

1. Commission of bankruptcy superseded by the consent of the petitioning creditor, refused to be revived upon the application of other creditors who had not come in under the commission.

T. 1714, cor. Harcourt, C.
Ex parte Mackerness,
1 *P. Wms.* 260.

2 *Eq. Abr.* 96. pl. 1.

The case is now altered by
3 *Geo.* 2.

2. A single creditor to whom 100 *l.* was due by two notes, and 53 *l.* part thereof not payable, (before 5 *Geo.* 2.) sued out a commission, which was set aside as irregular.

3. A

3. A commission was taken out, and *not sat on till three months after; this plainly shews it was done to protect the estate; the commission shall be superseded for example's sake, that such things should not be practised.*

T. 1725, cor. King, C.
Comb's Case, Sel. Ca. in Ch. 46.
2 Eq. Abr. 128. pl. 2.

4. He who has the body in execution cannot be a petitioning creditor. It is a satisfaction in law, and a commission in such case was superseded.

M. 1726, cor. King, C.
Burnaby's Case, 1 Str. 653.
Vide Read. Stat. Law, 189.
Goddard v. Vanderheyden.
3 Will. 271. S. P.

5. A commission of bankrupt was superseded because several of the debts of the petitioning creditors were barred by the statute of limitations.

M. 1728, cor. King, C.
Anon. Mos. 37.
Vide Cooke's B. L. 4 edit. 536.

6. One sued out a commission of bankruptcy, and for six months kept it without doing any thing upon it; the court for this reason only superseded the commission, though it was executed, and the trader found a bankrupt before any application to supersede it.

T. 1729, cor. King, C.
Ex parte Puleston, 2 P. Wms. 545.
2 Eq. Abr. 128. pl. 3.

7. A commission of bankrupt was superseded because granted upon the petition of an assignee of a bond, who though an equitable is no legal creditor.

1 Atk. 147. 2 Vef. 407.

P. 1731, in Canc.
Medlicot's Case, 2 Str. 899
Ca. temp. King, C.
Vide Ex parte Hylliard,
Ex parte Lee, 1 P. Wms. 782.

8. *L.* having two promissory notes signed by *A.* payable to him or order, four months after date; *L.*, when about three months was to run, indorsed them to *M.* for goods then delivered; and *A.* absconding about one month after, *L.*, on *M.*'s going to him, procures himself to be denied, and then *M.* sues out a commission of bankruptcy against *L.*, who petitioned to supersede the commission. By a late statute, a creditor by note payable at a future day may sue out a commission as well as come in as a creditor; but the debtor's denying himself to such a creditor is not an act of bankruptcy; it must be a keeping house, &c. in order to defeat or delay creditors of their debts, which could not be here, because *M.* had then no debt due to demand, so commission superseded. It was objected, that *L.* was debtor to *M.* immediately upon the goods delivered; *sed non allocatur*; for per Lord Chancellor, it was part of the contract that *M.* would stay for the money till the notes became due.

M. 1733, cor. King, C.
Ex parte Levi, 7 Vin. Abr. 61.
pl. 14. 2 Eq. Abr. 96. pl. 8.
Vide 1 Atk. 201.
Ex parte Hall.

Vide 5 Geo. 4. c. 30. s. 22.
which enacts, that it shall be lawful for any person taking bills, notes, or security for money, payable at a future day, to petition for a commission, or join in petitioning.

9. Where a debt is due to a wife as administratrix, the husband alone cannot make oath of this as a debt due to himself in order for a commission

S 2

of

M. 1734, cor. King, C.
Ex parte Seople,
2 Eq. Abr. 129. pl. 4.
7 Vin. Abr. 67. pl. 10.

of bankruptcy; therefore the commission was superseded, and restitution awarded.

30 April 1740, cor. Hardw. C.
Ex parte Goodwin, 1 Atk. 101.

10. Petitioning creditor shall pay costs of superseas only, where a commission is superseded merely for a defect in form, and no doubt of the act of bankruptcy; otherwise, if the act of bankruptcy had not been fully proved.

12 May 1742, cor. Hardw. C.
Ex parte Lingood, 1 Atk. 241.
2 Eq. Abr. 99. pl. 8.

In this case the bankrupt was committed, and contested the commissioners' right. *Vide ante*, 6. 9. pl. 3.

11. The court will not supersede a commission, or direct an issue upon a general affidavit of the bankrupt that he is not one; for he ought to give a particular answer to the facts charged in the depositions taken before the commissioners, but will leave him to bring a *habeas corpus* if he thinks proper.

14 Aug. 1742, cor. Hardw. C.
Ex parte Sydeborham, 1 Atk. 146.

In the case of one Whitlock, Lord Macclesfield held that an infant might be a bankrupt; but it has since been held otherwise.

12. A commission was superseded because it issued against an infant.

11 June 1743, cor. Hardw. C.
Ex parte Gulton the bankrupt;
Ex parte Dole, cross petition.
1 Atk. 193.

Vide Green, 40, 41.

13. Where there is a doubt of the bankruptcy, and the bankrupt is out of the kingdom, the court will not supersede the commission on petition, but send it to trial; but where the bankrupt is at home, the court will send it back to the commissioners to consider if, on the evidence, they can declare him a bankrupt or not.

6 Aug. 1743, cor. Hardw. C.
Ex parte Nutt, 1 Atk. 102.

14. Where a person against whom a commission is taken out has surrendered himself, and acquiesced a year and a half under it, the court will not direct an issue to try the bankruptcy, even though the act of bankruptcy were doubtful, but leave him to an action at law by trover against the assignees.

2 Aug. 1744, cor. Hardw. C.
Ex parte Crisp, 1 Atk. 135.

15. Though a majority of creditors agree to certify that a commission ought to be superseded at a meeting for that purpose, yet if one creditor says, "I shall be able to prove in a few days, do not certify yet," the court will not supersede till such creditor has an opportunity of proving his debt.

2 Dec. 1749, cor. Hardw. C.
Ex parte Gayter, 1 Atk. 144.
Vide Wilf. C. B. 145.

2 Burr. 1418.

Blackst. Rep. 427.

6 Com. Dig. 68.

Smith v. Brookstreet,

7 Term Rep. 300.

16. On superseding the commission, the court may either direct an inquiry before a Master of the damages sustained by the bankrupt, or a *quantum damnificatus* upon an issue at law; and after damages are settled, may, for the better recovery thereof, order the bond given to the Chancellor by

by the petitioning creditor to be assigned to the bankrupt.

17. Petition to set aside a commission of bankruptcy as being fraudulently obtained. It appeared that the petition was founded on the affidavit of three persons, who, by their voluntary affidavit, now came forward, and said they were perjured in having sworn themselves creditors before. The commissioners were directed to inquire whether these three persons were creditors of the bankrupt, and for what consideration, and at what time the several notes upon which they proved were given by the bankrupt, and whether any consideration, and at whose instance they were given, and to inquire into the reality of any other debt as they should see cause.

22 Oct. 1750, cor. Hardw. C.
Ex parte Lord, 2 Ves. 26.

18. After two dividends, the creditors release the bankrupt of all further demands: he petitions to supersede the commission, and for liberty to collect in the debts still due to the estate. The bankrupt admitted to stand in the place of the assignees to get in the remainder of the debts; but Lord Chancellor would not supersede the commission for the sake of the bankrupt, as it would entirely defeat his certificate.

28 Mar. 1751, cor. Hardw. C.
Ex parte Leaverland,
1 Atk. 145.

19. *A.* treated with *H.* the petitioner for the purchase of the equity of redemption of his estate in mortgage to *F.* 400*l.* was settled for the purchase; articles were signed, and *A.* pays 25*l.* 1*s.* to clear off the mortgage, and was to pay 150*l.* more on the execution of the conveyances. On *H.*'s refusing to complete the purchase, or pay off the mortgage, *A.* brought an action against him, and he was carried to gaol, where he lay two months; and upon this he was declared a bankrupt on *A.*'s debt. *H.* now applies to supersede the commission on a suggestion that *A.*'s debt is not of such a nature as entitles him to sue out a commission. Lord Hardwicke doubted whether *A.* could take out a commission on such a contract, saying, the remedy ought to have been a bill for performance of the contract; but if it had stood simply on this, Lord Hardwicke said he would not have superseded this commission, but left the bankrupt to try his bankruptcy at law. And it appearing that *A.*, since the issuing of the commission, had taken an assignment of the mortgage,

3 Aug. 1751, cor. Hardw. C.
Ex parte Hylliard,
1 Atk. 147. 2 Ves. 407.

he was restrained from proceeding on the commission; for, as standing in the place of the mortgagee, he could hold it till redeemed, and likewise compel a performance of the contract or oblige *H.* to refund the 25*l.* 1*s.* It appeared also that the receipt given by *H.* was nothing but an acknowledgment of receiving the 25*l.* 1*s.* in part of the purchase-money. No action in this case could be maintained, and therefore the very foundation of the commission failed, and *A.*, by taking an assignment of the mortgage, has got security for that money. It was sworn on both sides, that *A.* said, "Either pay me back the money, or convey the equity of redemption;" not a word of *A.*'s offering to pay the remainder of the purchase-money. Commission superseded at the expense of *A.*

7 Aug. 1751, cor. Hardw. C.
Ex parte Wood,
1 *Atk.* 221, 222.

20. Where a bankrupt did not surrender himself in due time, if there did not appear to be any intention of defrauding his creditors, Lord *Macclesfield*, in several instances, superseded the commission in order to prevent a prosecution for felony.

22 Jan. 1752, cor. Hardw. C.
Ex parte Wilson and Bradshawe,
1 *Atk.* 218.

21. A commission of bankruptcy is as much *ex debito justitie* as a writ; and no instance where the court supercedes it without directing an issue, unless it appears to be taken out fraudulently or maliciously.

3 Feb. 1753, cor. Hardw. C.
Ex parte Guffon, 1 *Atk.* 139.

22. An issue had been directed to try the bankruptcy of *G.*, and found no bankrupt agreeable to the judge's direction. The commission was therefore superseded on the bankrupt's petition; and as to the costs, a commission of bankruptcy is a proceeding at law in the first instance, and if costs are given there, they will follow of course in this court as consequential. The bankrupt had therefore his costs both at law and in equity against the petitioning creditor.

21 June 1753, cor. Hardw. C.
Ex parte Desjaneux, 1 *Atk.* 146.
Ld. H. thought there was a contrivance in this case to exclude some creditors whose debts were contracted after an act of bankruptcy committed.

23. After a commission of bankruptcy has been proceeded upon in the usual manner, and all the creditors have acquiesced in it, and the whole completely finished, the court will not supersede it, though the act of bankruptcy committed before the petitioning creditor's debt arose was of a doubtful nature.

12 Dec. 1753, cor. Hardw. C.
Ex parte Rocke, 1 *Atk.* 244.
When the bankrupt offered to

24. On 10th April 1744, it was referred to a Master to settle what was due to the creditors under

under the commission of bankruptcy against *Rooke*, and upon payment by the bankrupt the commission was to be superseded. The bankrupt offered to pay what was reported due, but the creditors insisting upon interest likewise from the date of the Master's report, the court said that the creditors here are equally entitled (as if they were in the common case of a reference to a Master in a cause to state what is due for the principal and interest) to be paid interest from the time of the Master's report when the sums due are liquidated; and the bankrupt was ordered to pay accordingly.

pay 20s. in the pound, he had an estate in reversion, which had now fallen into possession. The order of reference was made in March 1744, under the bankrupt's offer to pay immediately.

25. A commission of bankrupt having issued against a married woman, on a trading and act of bankruptcy, before marriage, superseded (on the ground of her marriage) as illegal.

M. 1787, cor. Tharlow, C.
Ex parte Mear & Ux.
2 Bro. Ch. Ca. 266.

26. Payment of a bill of exchange after the holder had issued a commission, is an act of bankruptcy; the holder was ordered to refund, and the commission was superseded.

3 June 1790, cor. Thurlow, C.
Ex parte Thompson,
1 Ves. jun. 157.
Vide Ex parte Gedge,
4 Ap. 1797.

27. A commission of bankruptcy was superseded; all the creditors being paid, and consenting, except two, who could not be found; but their securities were delivered up with receipts upon them, and their signatures proved.

21 Dec. 1702, cor. Lds. Comrs.
Ex parte King, 2 Ves. jun. 40.

28. Two commissions of bankruptcy for the same purpose cannot subsist together, in general the second will be superseded; but special circumstances, as consent, fraud, or laches, in the creditors under the first, will support the second and supersede the first; and though it is wrong to encourage a bankrupt to trade pending a commission, and to sue out a second, yet, if it does happen, and the assignees will pay the creditors under the first, 20s. in the pound and all the costs, the first will be instantly superseded.

9 Feb. 1793, cor. Loughb. C.
Ex parte Brown, 2 Ves. jun. 67.
4 Bro. Ch. Ca. 210.
Vide Martin v. O'Hara,
Cowp. 823. *Ex parte Proud-*
foot, 1 Atk. 252. *Davis's*
Bankrupt Laws, 440. *Ex parte*
Hardcastle, 25 July 1787. *Ex*
parte Hollingworth, 22 Dec.
1791.

the possibility of the bankrupt's property being more than competent to satisfy the creditors under the first commission 20s. in the pound. However, the doctrine laid down in *Atk.* and *Cowper* seems to have been confirmed by an express judgment in the principal case.

Considerable doubt was entertained by Lord Thurlow respecting the validity of a second commission against an uncertificated bankrupt, founded on

29. General order, that commissions of bankrupt to be executed in *London* shall be supersedeable for want of prosecution at the end of 14 days, and those not to be executed in *London* at the end of 28 days from the date; and that one day more shall elapse before the order for the *superfedeas*, and the application first made in that day by any other

26 June 1793, *Ordo Curia,*
Per Loughb. C.

attorney for a *superfedeas*, and a new commission, shall be preferred to that of the attorney who sued out the former.

24 Aug. 1797, cor. Loughb. C.
Ex parte Barrow, 3 Ves. jun. 554.
Vide 5 Geo. 2. c. 30. s. 23.

30. The bond, upon suing out a commission of bankruptcy, must be by the petitioning creditor, the commission therefore was superseded on account of his infancy.

Sec. 14. Of Partners and Joint Traders; and herein of their joint and separate Estates, and of the Proof of joint and separate Debts.

T. 1693, Cane.
Richardson v. Goodwin & al.
 2 Vern. 293.
Vide Gross & al. v. Dufresnay
 & al. 2 Eq. Abr. 111. pl. 5.
Vide Hankey & Garrait,
 1 Ves. jun. 236.
 (a) The Master was directed to take an account, and state a case.
Vide next case.

1. *A.* and *B.* are partners in trade; *A.* embezzles the joint stock, contracts private debts, and becomes bankrupt, and the partnership goods are assigned by the commissioners, first out of the joint stock the partnership debts are to be paid, then whether out of *A.*'s share of the partnership effects (a) satisfaction is not to be made for what he has embezzled of the stock, before his own private creditors can come in? *Quare.*

M. 1715, cor. Cowper, C.
Ex parte Crowder, 2 Vern. 706.

2. Separate creditors allowed to come in under a joint commission against two partners, but the joint effects are to be applied, first, to pay the partnership debts, and then the separate debts; and as to the separate effects, first the separate creditors are to be paid thereout, and then the partnership creditors,

22 Jan. 1728, cor. King, C.
Stephens & al. v. Brown and another, 2 Eq. Abr. 111. pl. 6.
Fitzgib. 283.

The separate estates of *A.* and *B.* certainly could only be liable to the joint creditors of *A.* and *B.* during such time as they were copartners; for after they had separated it seems they set up in business wholly unconnected with each other, and consequently each must have contracted a new set of debts on his own account.

3. *A.* and *B.* were partners, but the partnership being dissolved, and *A.* setting up for himself, became a bankrupt, and a commission issued out against him; and then *B.* failed, and a commission issued against him; the joint creditors were admitted to prove their joint debts under the separate commissions,

M. 1728, cor. King, C.
Ex parte Cooke, 2 P. Wms. 500.
Msf. 80. 2 Eq. Abr. 109. pl. 1.
Ex parte Crowder, 2 Vern. 706.
Ex parte Hardcastle,
 1 Cooke's Bank. Laws, 8.
Twiss v. Massey, 1 Atk. 67.
Ex parte Baudier, 1 Atk. 98.
In re Simpkins, 1 Atk. 138.
Vide 2 Ch. Ca. 139. cont.

4. It is a resolution of convenience, that in case of joint traders becoming bankrupts, the joint creditors shall be paid out of the partnership effects, and the separate creditors out of the separate effects; and if any surplus of the partnership effects after all the partnership debts paid, the separate creditors to come in, and so *vice versa*, the partnership

partnership creditors to come in on a surplus of the separate estate.

S. C. Two joint traders becoming bankrupts, first there was a joint commission, and the commissioners assign, afterwards separate commissions and assignments under them; the court held, that the assignment under the first commission conveyed all the bankrupt's estate both joint and several, and consequently that the assignments under the separate commissions were void.

has been checked in many cases, and a very salutary order was made Loughborough on 8 Mar. 1794. *Vide post.*

5. On a joint commission against two partners, bankrupts, the separate creditors, though they have taken out separate commissions, shall yet be at liberty to come in and oppose the bankrupt's certificate.

S. C. So where two partners are bankrupts, and a joint commission is taken out against them, if they obtain an allowance of their certificate, this will bar as well their separate as their joint debts, and so *vice versa*.

S. C. On a joint commission, the joint creditors are first to come in on the partnership effects, and if there remains a surplus, then the separate creditors are to be admitted.

6. Plaintiff and A. B. in November 1725 became partners in trade in Holland, and executed articles according to the laws and customs of that country. On 12th May 1728 A. withdrew, and the trade was carried on by plaintiffs and B. under the same articles. B. was intrusted with the partnership goods, which he embezzled, and suffered the partnership debts to remain unpaid; and having contracted private debts, a separate commission of bankruptcy was taken out against him on 30th November 1733. His assignees took possession of the partnership effects, and received partnership debts to the amount of 6500*l.* Plaintiffs bring their bill to have the partnership debts and effects applied to the payment of the demands on the co-partnership, and to have a satisfaction for what the bankrupt had embezzled, and to divide the residue among the partners according to their shares, and in the mean time to restrain a sale of the partnership effects then on hand.

The assignees, by their answer, admit the receipt of the property, and submit to apply it as the court

The assignees under the separate commission petitioned for liberty to sue at law for the separate estate, which Lord King would not permit; but he allowed them to join in a bill for an account of the separate estate.

It was too much the practice to sue out separate commissions against every partner in an insolvent house; but that practice upon the occasion by Lord Chan.

H. 1729, cor. King, C.

Horsey's Case,

3 P. Wms. 23, 24, 25.

2 Eq. Ab. 110. pl. 4.

126. pl. 9, 10.

Fitzgib. 283.

Vide Ex parte Yale.

3 July 1721, cor. Parker, C.

Ex parte Cook, antea.

Wickes v. Strahan, 2 Str. 1157.

Twiss v. Massey, 1 Atk. 67.

In re Simpsons, 1 Atk. 138.

Ex parte Rowlandson,

3 P. Wms. 405.

Hankey v. Garratt,

3 Bro. Ch. Rep. 457.

Vide Cooke's Bankrupt Laws,

4 edit. c. 10. s. 5.

1734, cor. Talb. C.

Grosz & al. v. Dufresnay & al.

Assignees, 2 Eq. Abr. 111. pl. 5.

Vide Hankey and Garratt,

1 Ves. jun. 236.

court shall direct. Decreed, that the Master should take an account of the *partnership debts received by plaintiffs in Holland, and of the partnership estate in England received by the assignees, and of the partnership debts owing by the bankrupt and the plaintiffs; that the joint creditors of the bankrupt and the plaintiffs come in and prove their debts before the Master. That an account be taken what embezzlement the bankrupt has made of the copartnership estate, and in taking accounts, plaintiffs and defendants to be examined on oath, to produce all books, &c. and to have all just allowances. That what the Master shall certify the copartnership debts shall amount to, shall in the first place be paid to the plaintiffs and defendants to the joint creditors, in proportion to their debts, and as far as the copartnership estate in their hands will extend. That if it shall appear any of the partnership estate remains in the plaintiffs' and defendants' hands, after the partnership debts are paid, then the Master to divide the same into three parts, and the plaintiffs are to take two thirds, and out of the bankrupts third part they are to take what it shall appear the bankrupt has embezzled of the partnership effects; and if there shall be any residue of the bankrupt's third part after the partnership debts and the embezzlements of the bankrupt are satisfied, then the same is to be paid or retained by the assignees for the benefit of the bankrupt's separate creditors. That the Master may state any thing specially, and all parties are to be paid their costs of suit out of the copartnership estate.*

H. 1735, cor. Talb. C.

Ex parte Rowlandson,

3 P. Wms. 405. 408.

2 Eq. Ca. Abr. 110. pl. 2.

If three are jointly and severally bound, the obligee cannot sue two of them jointly, for that would be suing them neither jointly nor severally, Roll. Abr. 148.

Vide Ex parte Bond, 1 Atk. 98.

Ex parte Banks, 1 Atk. 106.

Ex parte Blankenhagen,

Cooke's Bankrupt Laws, 164.

Vide Horsley's Case, antea, and 3 P. Wms. 23.

7. If *A.* and *B.*, joint traders, become bankrupts, and there are joint and separate commissions taken out against them, and *A.* and *B.* before the bankruptcy become jointly and severally bound to *J. S.*, *J. S.* may elect under which commission he will come, but he shall not come in under both; and he shall have a month's time to make his election: but if two joint traders owe a partnership debt, and one of the partners gives a bond as a collateral security for payment of this debt, here the joint debt may be sued for by the partnership creditors, who may likewise sue the bond given by one of the traders.

H. 1736, cor. Hardw. C.

Eastley v. Eastley, 1 Atk. 97.

8. If there is a joint commission against two partners, each must be found bankrupt, and though one die, the commission may go on; but if one be dead at the time of issuing the commission, it abates, and is absolutely void.

9. Separate

9. Separate creditors may come in under a joint commission and prove their debts; and if a bankrupt has a certificate under a joint commission, it discharges him from all debts joint as well as separate.

13 Mar. 1737, cor. Hardw. C.
Twiss v. Maffey, 1 Atk. 67.
2 Ves. 26. 327. 388, 389. 407.

10. A bond creditor to whom the partners were jointly and severally bound, may make his election to come against the joint or separate estate, but not against both, except for the deficiency, and after the other creditors are paid.

6 Aug. 1740, cor. Hardw. C.
Ex parte Banks, 1 Atk. 106.
2 Ves. 550.
Vide Ex parte Rowlandson,
3 P. Wms. 465.

11. A. lends a sum of money to one partner on his own security; that partner lends the same to his partner in trade; a joint commission is taken out. A. shall not come in as a creditor upon the joint estate of the bankrupts immediately and directly with the rest of the partnership creditors, but by way of circuitry he is entitled, as standing in the place of that partner who has paid the money to the use of the partnership trade.

22 Jan. 1741, cor. Hardw. C.
Ex parte Hunter,
1 Atk. 223. 225. 227, 228.

S. C. Where one partner takes out more money from the partnership stock than his share amounted to, the other has a right to come upon the separate estate of that partner *pro tanto*.

Ex parte Drake,
20 Dec. 1735, cited.

S. C. Two partners agree to borrow a sum of money, but one only gives a bond, and the other only a witness to it, the money afterwards entered in the cash-book of the partnership; a joint commission taken out; the obligee is entitled to be admitted a creditor.

Ex parte Gilbert Brown,
4 Mar. 1725, cited.

S. C. Joint creditors, where there are no separate, may exhaust both the joint and separate estate; but where there are both joint and separate creditors, the joint estate shall be applied to the satisfaction of the joint, and the separate estate to the satisfaction of the separate creditors.

Vide Ord. Cur. 8 Mar. 1794,
for the regulation of joint or separate debts under commissions joint or separate.

S. C. If there be a surplus of the separate estate, the joint creditors are entitled to it; for a bankrupt has no right to any thing till the creditors are fully satisfied.

See same order as to a surplus of either estate. Lord Hardwicke said, this determination is according to the rules of the court upon a view of the different rights of creditors.

12. Where there is both a joint and separate commission, a creditor under the joint may come under the separate, and assent or dissent to the certificate of the bankrupt under the separate commission.

14 Aug. 1742, cor. Hardw. C.
Ex parte Turner, 1 Atk. 97.
This rule was laid down by Lord Hardwicke in this case.

13. A joint commission was taken out against A. and B., and the assignees possessed themselves of all the joint and separate estate of both the bankrupts,

Dec. 1742, cor. Hardw. C.
Ex parte Powell and Powell,
2 Eq. Abr. 111. pl. 7.

Vide Ord. Cur. 3 Mar. 1794.

rupts. *J. S.* a creditor on the separate estates of both the bankrupts, and *T. L.*, a separate creditor of *B.*, one of the bankrupts, on behalf of themselves and all the separate creditors, petitioned that they and all the separate creditors might come in and prove their debts under the joint commission, and that the commissioners might take account of the joint and separate estates. Ordered, that the commissioners, by notice in the *Gazette*, appoint a time and place for the separate creditors of each of the bankrupts to come in and prove their debts under the joint commission: that the commissioners take separate accounts of the joint and separate estates of the bankrupts in the hands of the assignees, distinguishing the joint and separate estates of each bankrupt: that what on such account shall appear to belong to the bankrupts joint estate, shall be applied by the assignees towards satisfaction of the joint creditors; and in case of any surplus of the joint estate, then that the moiety of the surplus be carried to the account of the separate estate, and applied to satisfy the separate creditors, and if there be any surplus of the separate estates after all the separate creditors are paid, such surplus of the separate estate of either of them shall be carried to the account of the joint estate, and applied towards satisfaction of the joint creditors, and the respective separate estates to bear a proportionable part of the charges of the commission to be settled by the commissioners; and the costs of this application to be paid by the assignees out of the bankrupts separate estate; to be taxed by a Master, if the parties cannot agree.

23 Dec. 1742, cor *Hardw. C.*
Ex parte Baudier, 1 Atk. 98.
Vide Ex parte Cooke, ante,
 pl. 4. and notes.

14. A separate commission issued against two persons who had been partners, but their partnership had been dissolved before the bankruptcy. The joint creditors petitioned to prove under each separate commission. *Sed per Lord Hardwicke*—Where there is a joint commission against partners, separate creditors may come in and prove under the joint estate, and the joint creditors shall be satisfied out of the joint estate, and the separate creditors out of the separate estate, because the assignment is of the whole property: but where two persons who have been partners are made bankrupts as separate traders, their joint creditors cannot be admitted under each commission, for they have an equitable right to the surplus (if any) of both separate estates. *Lord Hardwicke* would not in this case appoint a receiver on behalf of the joint creditors,

ditors, but directed a joint commission to be taken out in the usual way.

15. Commissioners have no power to admit separate creditors to prove debts without the sanction of the court.

29 Mar. 1743, cor. Hardw. C.
Ex parte Sunden, 1 *Atk.* 68.

16. A separate commission taken out against persons formerly partners, the *joint creditors* upon an application to the court were left at liberty to bring their bill for any demand on account of the partnership against the assignees of the separate estate, who were directed to sell the whole effects, and deposit the money in the bank, but not to make a dividend until the suit should be determined.

29 Mar. 1743, cor. Hardw. C.
Ex parte Vogel and others,
1 *Atk.* 132.

S. C. The joint creditors allowed to prove their debts under the separate commission in the mean time without prejudice.

17. A commission may issue against one partner for a joint debt, though an action cannot be maintained against one without joining the other two partners.

2 Aug. 1744, cor. Hardw. C.
Ex parte Crisp, 1 *Atk.* 133.
This point was decided upon a
strict verdict in C. B. 5 May
1744, upon an issue directed in
the judges on the matter reserved.

this case, and confirmed by the opinion of

18. Doubtful whether a creditor under a separate commission against *A.*, and debtor to a joint commission against *A.* and *B.*, can set off the debt he owes the latter by his demand against the former.

21 Jan. 1745, cor. Hardw. C.
Ex parte Edwards, 1 *Atk.* 100.
It appeared these debts arose in
distinct rights. *Ld. Hardwicke*.
directed the commissioners to as-
certain and certify the amount of
each debt.

19. A joint commission of bankruptcy taken out against two persons, and a separate commission against one, a creditor upon their joint and several bond is not entitled to have a full satisfaction out of both estates at the same time, but must make his election upon which of the estates he will come in the first place; and such creditor shall have time to look into the accounts of the bankrupt's joint and separate estate before he makes his election.

22 Jan. 1745, cor. Hardw. C.
Ex parte Bond and Hill,
1 *Atk.* 98.
Ex parte Parminter and others,
24 Dec. 1736, cor. Talb. C.
Ex parte Abingdon and others,
29 Mar. 1737.

the bankrupt's accounts, and see which will be the most beneficial estate to come upon in the first instance, which was not done in the cited cases.

Ex parte Banks, 6 Aug. 1740.
all cited in S. C. and are in
point, but in the principal case
Ld. Hardw. ordered that the pe-
titioners have time to look into
the estates to come upon in the first in-
stance.

In *H.* 1735 *Ld. Talbot* allowed a bond creditor a month's time to make his election upon the same principle. *Vide Ex parte Rowlandson*, 3 *P. Wms.* 405.

20. *H.* a silkman and *F.* a dealer in coals are partners in both trades; they afterwards dissolve the partnership, and *F.* gives *H.* a release of all demands, and took upon him the payment of the debts due from the coal trade, and *H.* the debts from the silk trade, and the respective debts were assigned accordingly. *H.* dies, and a commission

20 Jan. 1746, cor. Hardw. C.
Ex parte Titner, 1 *Atk.* 135-6.

of

Ld. H. said, that though the seizure by the messenger was illegal, the turning him out was equally so; for the owner should assert his right by course of law, but the evidence on the part of the petitioner is too slight to support the charge.

27 Jan. 1749, cor. Hardw. C.
Ryal and others, Assignees, v. Rolle,
Executor, and others,
1 Atk. 183-4. 1 Ves. 348. 375.

Ld. Hardwicke said, this question was never carried farther than to debts contracted relative to the partnership, either after the bankruptcy or death of one of the parties.

Crofts v. Pyke, 3 P. Wms. 150.
is a strong negative case to this purpose.

21 Dec. 1752, cor. Hardw. C.
In re Simpsons, Bankrupts,
1 Atk. 138.
Vide Ex parte Baudier, 1 Atk. 98.
Ex parte Cooke, 2 P. Wms. 500.

9 Aug. 1754, cor. Hardw. C.
Ex parte Dumas, 1 Atk. 232, 233.
2 Ves. 582. 585.

of bankruptcy is taken out against *F.*; and the messenger attempting to seize the effects of *H.* in the hands of his representative, is opposed and turned out of possession. The assignee petitions, complaining of the force upon the messenger. By the release of *F.* to *H.* the whole property of the silk trade vested in *H.*, and the assignees of *F.* standing in no better light than the bankrupt, the goods of *H.* ought not to have been seized under the commission against *F.*, and the petition dismissed with costs.

21. A share of the partnership trade mortgaged to a partner must be delivered, or it is a delusive credit, and falls within the *stat. 21 Jac. 1. c. 19.* if otherwise, it would let in all the inconveniences which the statute intended to prevent.

S. C. How far partnership stock is liable to the debts of partners in the first place?

S. C. Where one partner lends money to another

partner generally, and it is not entered in the partnership books, he does not gain a specific lien upon the share of the borrower.

22. Formerly where there were several partners, the custom was to take out separate commissions against each partner, as well as a joint commission; but the court now keep only one commission on foot, and direct distinct accounts to be kept of the several estates.

Where there is a joint commission, separate creditors ought to apply to be admitted to prove their debts under that, to save expence to the creditors.

Upon an application of joint creditors to be admitted under a separate commission, ordered provisionally that they shall be admitted creditors, and assent or dissent to the bankrupt's certificate, because it would otherwise clear him of the debts of joint creditors as well as separate.

23. *Dumas* and others, the petitioners, drew bills of exchange on *Jullian* and Son for 1115 *l.*, and undertook to make remittances to pay the same; and at the same time acquainted them that these bills were for the proper account of the petitioner's house at *Cadiz*, and desired the *Jullians* would keep a distinct account, and distinguish such new account by the letter *G*, being the initial letter of the first partner's name at *Cadiz*:—bills drawn

drawn on *Vanneck and Co.* in *London* to the amount of 1146*l.* 11*s.* 11*d.* were remitted accordingly. The *Jullians* by letter acknowledge the receipt thereof, and promise petitioners to give credit in their account *G.* *Jullian* the father died the 25th *February* last. The day before the son stopt payment he got two of the remittances discounted for 566*l.* 11*s.* 11*d.* On the 20th *March* a commission of bankruptcy issued against *Jullian* the son; *Dumas*, &c. prefer their petition, and pray that the assignees may be directed to deliver to them the several bills of 1146*l.* 11*s.* 11*d.*, or pay the full value. Lord Chancellor of opinion, the specific bills amounting to 580*l.* ought to be delivered by the assignees of *Jullian* to the petitioners. As to those which were discounted, the petitioners waived their claim.

The rule of equality under commissions of bankruptcy extends only to his own estate; otherwise, where the matters in question are not relative to his estate in law or equity.

24. Debts upon the insurance of ships are only proveable against the separate estate of the partner who signs the policy, the insurance by a partnership being against 6 *Geo. 1. c. 18.*

11 Aug. 1784, cor. Thurlow, C.
Ex parte *Angerstein*,
Ex parte *Lee*,
1 Bro. Ch. Ca. 399, 400.

25. Joint creditors let in to prove against a separate estate, by consent.

24 Dec. 1784, cor. Thurlow, C.
Ex parte *Cobbam*,
1 Bro. Ch. Ca. 576.

Lord Chancellor said, as the petition in this case was consented to, he should make the order, and leave the point, Whether joint creditors can prove under separate commissions to be discussed upon future consideration. The question being thus left open, the petitions *Ex parte Haydon*, *Ex parte Hodgson*, *Ex parte Page*, and *Ex parte Flintum*, were speedily presented, on the hearing of which latter petition *Ld. Chancellor* said, he thought the point settled that joint creditors might prove under separate commissions.

26. Separate commissions issued against *S.* and *P.* It appeared that they were in partnership only by issuing bills under the firm of *S.* and *P.*, and it was admitted there were no partnership effects. Petitioner was allowed to prove under both separate commissions.

24 June 1785, Canc.
Ex parte *Haydon*,
1 Bro. Ch. Ca. 454.

27. Bankrupt partners paying different proportions towards the debts, shall have but one allowance, which shall be divided between them in the proportions their respective estates have paid.

T. 1785, cor. Thurlow, C.
Ex parte *Bate*, 1 Bro. Ch. Ca. 452.

28. Where various partnerships had existed between bankrupts, which had commenced at different times, separate accounts of each partnership fund were directed upon the bankruptcy of all,

M. 1785, cor. Thurlow, C.
Ex parte *Marlin*,
2 Bro. Ch. Ca. 15.

all, and that each estate shall first bear its own debts.

M. 1785, cor. Thurlow, C.
Ex parte Hodgson,
2 Bro. Ch. Ca. 5.

29. Bankrupt being indebted on his private account, gave his creditor (who required a better security) a partnership note. His partner lived in the *East Indies*. The creditor proved this note under the separate commission. On a petition that this joint debt might be rescinded, Lord Chancellor declared, that debts whether sole or joint ought to be paid out of the bankrupt's estate, which is composed of his separate and his moiety of the joint estate. Petition dismissed.

T. 1786, cor. Thurlow, C.
Ex parte Page and others,
2 Bro. Ch. Ca. 119.

30. In this case joint creditors were admitted to prove under the separate estate of one partner. The debts were for goods sold to the partnership.

T. 1786, cor. Thurlow, C.
Ex parte Flintum,
2 Bro. Ch. Ca. 120.

Ld. Chancellor said he thought the point was settled that joint creditors might prove under separate commissions, especially since the case *Ex parte Crisp*, 1 Atk. 133. which had decided that joint creditors might sue out a separate commission.

31. *D.* and *O.* were partners and dissolved; two years after the dissolution *O.* became bankrupt. The joint creditors of *D.* and *O.* were admitted to prove against *O.*'s separate estate.

24 Dec. 1787, cor. Thurlow, C.
Ex parte Copland,
Cooke's Bpt. Laws, 4 edit. 242.

But these latter determinations, says Mr. Cooke, have been since controverted, and after much discussion at the bar, it has been held that where there is a joint fund, or there are solvent partners, a joint creditor cannot take dividends from the separate estate, until an inquiry has been made what the joint creditors had or might have received from the partnership effects. *Vide Ex parte Elton*, 2 Ves. jun. 238.

32. Two partners in *Jamaica* were indebted on their joint and several bond; one of the partners coming to *England* became bankrupt separately; the assignees of the bond creditor petitioned to be admitted under the separate commission. Lord *Thurlow* declared, that a joint creditor of a co-partnership is at liberty to prove under a separate commission against any copartner, and ordered accordingly, so as not to disturb any dividend then already made.

P. 1789, cor. Thurlow, C.
Ex parte Clowes,
2 Bro. Ch. Ca. 595.

33. A creditor of one partner, on bond for money which came to the use of the partnership, may prove against the joint or separate fund; but when a dividend is made, he must elect from which fund he will take his dividend.

20 April 1790, cor. Thurlow, C.
Ex parte Jackson,
1 Ves. jun. 131.

34. A sole trader indebted by bond took in a nominal partner, but without fraud; two years after the partnership failed; that separate debt not permitted to be proved under the joint commission, unless something appeared, as payment of interest by both, to make the partnership liable, for which very little would be sufficient.

35. Creditors of a partnership, which failed in two years, allowed to come upon the separate estate of one partner in respect of effects taken out of the partnership by him, without the privity of the other.

T. 1790, cor. Thurlow, C.
Ex parte Assignees of Lodge and Dr. Fendall, 1 Ves. jun. 166.

S. C. Assignees under separate commission cannot come upon joint estate for a sum brought into the partnership beyond his share, for creditors rely on the ostensible state of the fund.

Vide Case of Fordyce, cor. Bathurst, C.

36. One partner absconded, and died abroad, but never was a bankrupt; a separate commission issued against the other, under which the assignees seized joint effects; the joint debts are to be first paid out of the joint fund, and the residue divided between the bankrupt's estate and the representative of the deceased partner for whom the surviving partner (the bankrupt) was no more than a trustee.

M. 1790, cor. Thurlow, C.
Hankey v. Garrett,
1 Ves. jun. 236.

37. Where there is a joint commission against partners, and a separate commission against one, the assignees having taken possession of the whole fund, must divide it among the joint creditors, and the separate bond creditors of the other partners cannot claim against them.

H. 1792, cor. Buller, J. adf. C.
Hanley v. Garrat,
3 Bro. Ch. Ca. 457.

partner has an interest in the joint property, and in the debts on the joint estate: that relief, therefore, must be sought by bill, which is the most proper mode by which important questions should be brought before the court. Though the court has no more power on a bill than on a petition, yet it is often necessary to adopt the filing of a bill to settle the demands of creditors. *Vide Curtis v. Ashton*, in Ch. 1791. *et vide Ex parte Lydiard*, 19 May 1790, where the same relief was refused on petition, and the party was put to file his bill. *Vide also Lafabloniere v. Swinton*, 18 June 1793. S. P.

Note; An order for keeping distinct accounts under a separate commission against a copartner cannot be made upon petition without consent; for the solvent

38. Joint and separate commissions of bankruptcy now are blended together, and the practice of taking out both is exploded as an unnecessary expence.

9 Feb. 1793, cor. Loughb. C.
Ex parte Browne, 2 Ves. jun. 693

39. Ordered, that the commissioners in a joint commission be at liberty to admit the proof of separate debts under such joint commission, and that the separate creditors be at liberty to assent to or dissent from the allowance of the bankrupt's certificate; and that the commissioners do cause distinct accounts to be kept of the joint and separate estates, and that what shall belong to the separate estate shall be applied to satisfy the separate creditors; and if there shall be any overplus of the joint estate after the joint creditors are satisfied, the share of the bankrupt in such overplus, whose separate estate is to be applied as before directed, shall be carried to the account of his separate estate in

Ord. Cur. 8 Mar. 1794.
Per Loughb. C.
4 Bro. Ch. Ca. 548.

satisfaction of his separate debts; and so in like manner if there be an overplus of the separate estate of any such bankrupt, it shall be carried to the account of the joint estate, and be applied in satisfaction of the joint debts. The costs of taking the accounts to be paid out of the separate estate, and to be settled by the commissioners.

T. 1796, cor. Lough. C.

Ex parte Quinten,

3 Ves. jun. 248.

Surviving partner may set off a joint debt. *Slipper v. Stedstone*, 5 Term Rep. 493.

40. Separate commission of bankruptcy against one partner, the other paid the joint debts; a debtor to the partnership, being also a separate creditor of the bankrupt, was allowed upon petition to set off against the bankrupt's share of the joint debt, and to prove for the residue of his separate debt, the solvent partner consenting to receive his share.

T. 1796, cor. Loughb. C.

Ex parte Elton,

3 Ves. jun. 238. 241.

41. In bankruptcy the usual directions are to apply the funds respectively; the joint to the joint debts, the separate to the separate debts; the surplus of each to the creditors remaining on the other.

S. C. Upon a petition of joint creditors to be admitted to prove under a separate commission, it was ordered, that they should be admitted, but not to receive a dividend; and that the dividend shall be reserved till an account is taken of what they have or might have received from the partnership effects.

S. C. Separate creditors cannot take a dividend upon the joint estate rateably with the joint creditors; each estate is applicable to its own debts.

Sec. 15. Of mutual and contingent Debts.

T. 1716, cor. Cowper, C.

Ld. Lanesborough & al. v. Jones, 1 P. Wms. 325.

Note; This subject has received further regulation by stat.

5 Geo. 2. c. 30. *Vide* *Ryal v.*

Rowles, 1 Ves. 375. As to the

general construction of cases re-

specting mutual credits, *vide* *Ex parte Deeze*, 1 Atk. 228.

Ex parte Prescott, 1 Atk. 230. *Ex parte*

Ochden, 1 Atk. 235. *French v. Fenn*, *Cooke's Bank. Laws*, 577.

Grove v. Dubois, 1 Term

Rep. 112. *Bize v. Dickson*, 1 Term Rep. 283. *Hankey v. Smith*, 3 Term Rep. 507.

Whitehead v. Vaughan, *Cooke's Bank. Laws*, 587. *Smith and Hodson*, 4 Term Rep. 211.

1. *A.* Is a goldsmith, and there is a mutual credit between *A.* and *B.*, and *A.* becomes a bankrupt; only the balance shall be liable to the bankruptcy; and it is not material whether the mutual credit be by open account or mutual stated debts.

May 1717, Canc.

Lake, Bart. and others v. Ma-

son, 2 Eq. Abr. 481. pl. 14.

1 Bro. P. C. 579.

15 Vin. 524. c. 4.

2. There being accounts current between *A.* and *B.* a goldsmith, *B.* gives out his cash note to *C.* for 5000 *l.*, and *A.* mortgages his estate as a collateral security for the money; *B.* gives *C.* 100 *l.* for his fa-

your in the matter, who keeps the cash note by him. Some time after the mortgage forfeited, B. becomes a bankrupt; A. prays relief, because C. neglected to turn the cash note into money, when he might have done it. It was directed, that an account be taken how matters stood between A. and B.

3. J. S. in 1711 had 5000*l.* stock in the *Hudson's Bay Company*, and was their banker or cashier, and upon that account was indebted to the company in 800*l.*, and soon after became a bankrupt. The assignees bring a bill against the company to transfer the 5000 *l.* to them, with the dividends. The company by their answer insist that by virtue of a bye-law the stock and dividend of each adventurer shall be obliged to such debts and engagements as such adventurer shall become engaged in to the company, and that the committee of the company for the time being shall and may distrain the same until such debts and engagements are fully satisfied; that the company is not obliged to transfer the stock to the plaintiffs until they pay the 800*l.* due to the company; and they also insisted upon the clause in the *stat. 5 Geo. 2. cap. 30. sect. 28.* of setting off debt against debt; and that J. S. having credit in their books for 5000*l.* stock, and the company on the other hand have credit in J. S.'s books for 800*l.*, they might deduct and have an allowance of the 800*l.* out of the 5000*l.* stock. Lord Chancellor King was of opinion that the bye-law was not good; but Raymond, C. J. and Price, B. who assisted his lordship, thought it a good bye-law. But Lord Chancellor thought this case to be within the clause of the above statute, and therefore said, he needed not give any direct opinion as to the bye-law; that here was mutual credit given; and therefore decreed, that the company may retain the 800*l.* out of the dividends due to the bankrupt's estate, subsequent to the bankruptcy, and shall not be obliged to come in as a creditor under the commission.

4. Plaintiffs were assignees under a commission of bankruptcy against Sir J. B., and brought this bill against defendants to compel them to transfer to plaintiffs several shares in their stock to which Sir J. B. was entitled. It appeared that Sir J. B. was a director of the company, and having so large a portion of stock, the company lent him 12,000*l.* but not upon the security of his stock, yet the company insisted on a right to stop the stock until repayment. *Per curiam*—Defendants must permit plaintiffs to

T 2 transfer

M. 1726, cor. King, C. cum. assist.
Gibson & al. Assignees v. Hudson's Bay Company,
1 Str. 645. 2 Eq. Abr. 122. pl. 2.
7 Vin. Abr. 125. pl. 2.
Vide Meliorucchi v. Royal Exchange Company, 1 Eq. Abr. 9. pl. 3.

Note; In the quotation of this case, 1 Eq. Abr. 9. pl. 3. it is stated that there was a bye-law which subjected every member's stock to his debts to the company, on which the decree was founded; but the general doctrine was exploded.

T. 1728, cor. M. R.
Meliorucchi v. Royal Exchange Assurance Company,
1 Eq. Abr. 9. pl. 3.
Vide Demanbray v. Metcalfe,
Gibson v. Hudson's Bay Company.

transfer the stock, since they cannot retain it under the statute of 5 Geo. 1. for the loan was not made by defendants in their corporate capacity, but as private persons.

1732, cor. King, C.
Ex parte Riley, W. Kel. 24.

5. Two partners, creditors of a bankrupt, and one of them a debtor to him on a separate account, the joint debt cannot be set off against the separate demand.

4 Nov. 1743, cor. Hardw. C.
Bromley and others v. Gondere,
Assignee, 1 Atk. 75. 77. 80.

6. Where there is a mutual credit between a bankrupt and a creditor, the commissioners ought to stop interest on both sides at the time of the bankruptcy, or compute interest on both sides till the settling the account.

1 Aug. 1744, cor. Hardw. C.
Ex parte Simpson, 1 Atk. 68.

7. Commissioners upon the day of choosing assignees are not to examine critically into the debt, but admit creditors for what they swear is due to them, as they are liable to an account afterwards.

A creditor by bond and an open account likewise shall be admitted to prove the bond, because the commissioners can still take the account, and upon a dividend he shall be entitled to no more than is due to him on balance.

22 Dec. 1744, S. C. 70.

A creditor in all cases of open accounts ought not to be excluded till the account is taken, because then the choice of assignees must arise from a *minor* part in value of the creditors; but still if commissioners have just grounds to doubt the debt, they do right to admit it only as a claim.

20 Oct. 1744, cor. Hardw. C.
Ex parte Grooms, 1 Atk. 119.

8. A debtor to a bankrupt before his bankruptcy, and creditor to him upon a contingency that takes place after the bankruptcy, shall not be at liberty to set off under the clause relating to mutual credits.

21 Jan. 1745, cor. Hardw. C.
Ex parte Edwards, 1 Atk. 100.
It appeared these debts arose in distinct rights. Lord Hardwicke directed the commissioners to ascertain and certify the amount of each debt.

9. It was doubtful whether a creditor under a separate commission against A., and debtor to a joint commission against A. and B., can set off the debt he owes the latter by his demand against the former.

8 June 1748, cor. Hardw. C.
Ex parte Deane, 1 Atk. 228, 229.
Vide Blackst. Rep. 653.

10. A packer may retain goods till he is paid the price of packing; and if he has another debt due to him from the same person, the goods shall not be taken from him till he is paid the whole, notwithstanding the debtor is become a bankrupt.

There

There have been many cases to which the clause relating to mutual credit has been extended, where neither an action of account would lie, nor could the court of Chancery decree one.

Mutual credit is not confined to pecuniary demands only, but if a man has goods in his hands belonging to a debtor, it shall be considered as such.

11. A person may set off a debt under the bankrupt acts, though not relative to the mutual credit between him and the bankrupt.

Ld. H. thought this a stronger case than *Demainbray v. Metcalfe*, 2 Vern. 691.

4 Feb. 1749, cor. Hardw. C.
Ryal and others, Assignees, and Rolle, Executor, & al.
1 Atk. 185.

12. Mr. *Billon* and one *Mitchell* had various transactions together, principally negotiating bills of exchange from 1742 to the 8th June 1743; and on the 18th April 1743 *Mitchell* committed a private act of bankruptcy. The sums paid by *Mitchell* for these transactions to the plaintiff amounted to 3000 *l.* The assignees bring an action against *Billon* for so much money had and received to their use, and recovered a verdict against him for 3000 *l.* *Billon* insisted on the trial to have 712 *l.* allowed him as paid to and for the bankrupt; but being refused, brought a bill for the 712 *l.* *Billon* entitled to have this allowance, and the verdict not conclusive upon him (a), because it is a matter of contract and of account; and in that respect a proper subject for the jurisdiction of the court of Chancery.

25 Nov. 1749, cor. Hardw. C.
Billon v. Hyde and another,
1 Atk. 126-7.

Vide Rider v. Fowle, 3 Lev. 58.
In trover by assignees the courts have leaned against a strict construction of the bankrupt acts to the prejudice of a fair creditor.

(a) *Vide Wilson v. Boulter*,
Raym. S. P.

13. A creditor against the bankrupt for 100 *l.* and 10 *l.*, and a debtor to him upon bond for 340 *l.*, payable on the 4th of March 1756, with lawful interest, applies that he may set off his demand of 110 *l.* against the principal and interest due on the bond as far as it will go, and not be obliged to prove his debt under the commission, and take a dividend upon it only. This is not in strictness a mutual debt; and yet it is a mutual credit; for the bankrupt gives a credit to the petitioner in consideration of the bond, though payable at a future day, and he gives the bankrupt credit for the debt he owes him upon simple contract, and therefore within the equity of 5 Geo. 2. An account directed by the court to be taken between the petitioner and the bankrupt, and the balance only to be paid to the assignees.

16 Aug. 1753, cor. Hardw. C.
Ex parte Prescott, 1 Atk. 230.
Lord Chancellor said, that in arguing this case no precedent had been cited pro or con; he should therefore determine according to the rules of equity, and make a precedent.

14. Merchants abroad draw upon a correspondent for a particular purpose, and remit other bills

9 Aug. 1754, cor. Hardw. C.
Ex parte Dumais,
21 *eq.* 582. 585. 587.
1 Atk. 232.

The rule of equality does not extend to matters not relating to the bankrupt's estate in law or equity.

Vide 5 Geo. 2.

22 Aug. 1754, cor. Hardw. C.
Ex parte Ockendon,
1 Atk. 235, 6, 7.

Vide Blackst. Rep. 653.

T. 1789, cor. Thurlow, C.
Ex parte Harrison,
2 Bro. Cb. Ca. 615.

T. 1791, cor. Thurlow, C.
Hankey and others v. Vernon & al.
3 Bro. Cb. Ca. 313.

T. 1796, cor. Loughb. C.
Ex parte Quinten, 3 V. jun. 248.
Surviving partners may set off
a joint debt. *Slipper v. Steadstone*,
5 Term Rep. 493.

to answer it; the correspondent becomes a bankrupt; those bills remaining unnegotiated, must be delivered up by the assignees, or the money received thereon to the original owners. The intent of the bankrupt laws is to put all creditors upon an equality, *as to the bankrupt estate only*, for assignees take subject to all equities at the time of the bankruptcy.

When the demands between debtor and creditor are mutual, the balance only shall be deducted out of the bankrupt's estate.

15. In *March* a commission of bankrupt issued against *Matthews*, he being then indebted to *Ockendon* in 286 l. 7 s. 10 d. for grinding corn. *O.* had in his possession thirty-six loads and three bushels of wheat belonging to the bankrupt, part ground and part grinding, besides a great number of sacks. 16 l. 5 s. was due to him for grinding the corn, which was in his hands at the time *M.* became bankrupt. The wheat was sold by the assignees, by agreement between them and *O.*, without prejudice to his claim, who applied by petition to be paid his whole debt out of the money arising by the sale. *Per curiam*—*O.* had no specific lien upon the corn and sacks, but a particular one only *pro tanto* as is due for grinding the corn in his hands, and the wheat belonged to the assignees.

16. An engagement, otherwise than by indorsement, to warrant the payment of a bill of exchange, which does not become due till after the bankruptcy, will not enable the holder to prove it under a commission of bankruptcy, because it is contingent.

17. Bankers receive and pay money on account of a bankrupt, after notice of an act of bankruptcy, all the sums received are so to the use of the estate, and they cannot set off the payments made, or be allowed to come in as creditors, and claim dividends on debts paid, which were owing before the act of bankruptcy.

18. Separate commission of bankruptcy against one partner, the other paid the joint debts; a debtor to the partnership, being also a separate creditor of the bankrupt, was allowed upon petition to set off against the bankrupt's share of the joint debt, and to prove for the residue of his separate debt.

debt, the solvent partner consenting to receive his share.

S. C. At law there can be no set-off between joint and separate debts.

19. Acceptor becoming bankrupt, the petitioner having indorsed before the bankruptcy, took up the bill. He may prove the bill he took up, but cannot set off a debt due from him to the estate, viz. his own acceptance for 90 l. in the hands of the bankrupt.

4 Feb. 1797, cor. Loughb. C.
Ex parte Hale, 3 Vd. jun. 304.

Sec. 16. What is or is not an Election to abide under a Commission of Bankruptcy.

1. Creditors who come into the commission shall not imprison the bankrupt for not paying the debt.

H. 1719, cor. Parker, C.
Ex parte James, 1 P. Wms. 612.
Vide Ex parte Salkeld, post.
Vide Anon. 2 P. Wms. 394.

2. Though a creditor proves his debt, and becomes assignee, he may take the bankrupt in execution, if he will waive his benefit of the statute.

T. 1719, cor. Parker, C.
Ex parte Salkeld;
1 P. Wms. 560. 562, 3.
Vide Ex parte Capot, 1 Atk. 219.
Ex parte Ward, 1 Atk. 153.
Ex parte Lindsey, 1 Atk. 220.
Ex parte Dorvilliers, 1 Atk. 221.

The reason of a creditor's proving his debt is, that he may oppose the bankrupt's discharge.

No election in case of a creditor's proving his debt to be paid out of the bankrupt's effects, if no effects.

3. Where a bankrupt is in execution before the commission, and a creditor comes in and receives a dividend out of the estate, the court will put him to his election either to discharge the bankrupt or renounce the dividend (a). But where A. sued out a commission of bankruptcy against B. in 1726, and in 1727 received a dividend of 2 s. 6 d. in the pound, and now lately took B. in execution for the rest of his debt, upon which B. petitioned to be discharged, he was denied. Note, The bankrupt did not obtain his certificate.

M. 1733, cor. Talbot, C.
Ex parte Blewin,
2 Eq. Abr. 127. pl. 14.
Vin. Abr. tit. Creditor and Bankrupt, (S. a), pl. 17.

(a) This in conformity to the law, where, if the creditor will take the debtor in execution, he cannot afterwards take a *fi. fa.* because the body is deemed a satisfaction; otherwise, if the creditor take a *fi. fa.* first and levies short, he may issue a *ca. fa.* afterwards.

4. F. having proved his debt of 2000 l. under L.'s commission, and paid contribution, and yet had L. in execution for his debt, it was ordered by the late Lord Chancellor, that F. should either discharge L. or lose his dividend; and the commissioners having certified that four-fifths in number, &c. had consented to L.'s discharge, exclusive of F., he now

T. 1734, cor. Talbot, C.
Ex parte Fenwick,
2 Eq. Abr. 128. pl. 16.
7 Vin. Abr. 134. pl. 20.
Settled, on great debate, that a creditor is at liberty to elect to proceed at law; and, notwithstanding, may assent or dissent to the certificate. The case of putting creditor.

to election is but modern in favour of bankrupts; but if that election is made in general terms, and in consequence the creditor is to be excluded from a liberty of dissenting to the certificate, the rest of the creditors are not only to take all the rest of the effects, but have it in their power, by allowing the certificate, to bar the other's debt; so that permitting such creditor to assent or dissent to the certificate is not to give him a benefit, but to prevent his being hurt. And the late stat. (5 Geo. 2. c. 30. §. 10.) mentions four-fifths of creditors who shall have proved their debts, and not who proved, &c. and sought relief: and it would be hard to put it in the power of a few small creditors, by consenting to the certificate, to preclude the other of his debt; and therefore as the court, by equitable construction, puts a creditor to his election of abiding by his remedy at law or coming in to share his dividend under the commission; so, by the same rule of equity, such creditor renouncing any benefit under the commission should not be hurt.—Per Lord Chancellor, *ibid*.

M. 1734, cor. Talbot, C.

Ex parte Holey,

2 Eq. Abr. 127. pl. 15.

7 Vin. Abr. 134. pl. 19.

* The word *not* is omitted in the original.

4 Ap. 1739, cor. Hardw. C.

Ex parte Capot, 1 Atk. 219, 20.

Otherwise the bankrupt may by the rest of the creditors be discharged from the remedy which this creditor had elected to take.

23 Dec. 1743, cor. Hardw. C.

Ex parte Ward, 1 Atk. 153.

26 Oct. 1745, cor. Hardw. C.

Ex parte Lindsey, 1 Atk. 220.

It not being clear in this case, whether the debt proved under the commission was the same for which the action was brought, and the proceedings being misla.

petitioned against allowing of the certificate, and that he might be admitted to come in so far under the commission as to have liberty to assent or dissent.

5. A bankrupt in prison on a *mesne* process at the suit of A., prayed that A. might make election whether he would come in under the commission, or take his remedy at law. Per Lord Chancellor—A. may make a special election to take his remedy at law, and to come in under the commission, so far as to prove his debt, and assent or dissent to the certificate, because that will (not*) affect his remedy at law, but he is to waive any dividend or further benefit under the commission; and A. accordingly made his election.

6. An assignee upon refunding what he had received under two dividends, was allowed to make his election to proceed at law against the bankrupt.

The old laws considered bankrupts as fraudulent insolvents, but the more modern as unfortunate ones; and upon these late statutes have the applications been made to compel creditors who proceed in a double way to make their election.

The reason why such creditor who elects to proceed at law shall still be allowed to assent or dissent to the bankrupt's certificate, is to make the remedy against the person effectual.

7. Where persons refuse to prove debts under a commission, the barely being assignees will not determine their election, but they may still sue the bankrupt at law. But a petitioning creditor determines his election by taking out the commission, and cannot sue the bankrupt at law, though for a debt distinct from what he proved.

8. Notwithstanding a creditor under a commission of bankruptcy elects to proceed at law, he may still assent or dissent to the certificate.

9. Where

9. Where a bankrupt is in execution for one debt, and the judgment creditor has another against him of a distinct nature, he may prove *this* under the commission, notwithstanding he refuses to waive his execution upon the other.

4 June 1746, cor. Hardw. C.
Ex parte Botterell, 1 Atk. 109.
Lord H. thought this a hard case on the bankrupt.

10. A petitioning creditor has not the same election as a common creditor; for if he was to elect to proceed at law, it would supersede the commission.

7 Aug. 1746, cor. Hardw. C.
Ex parte Lewis, 1 Atk. 154.

11. A creditor after he has received a dividend under a commission will be allowed to bring an action at law for his debt, upon refunding that dividend.

11 Ap. 1747, cor. Hardw. C.
Ex parte Grove, 1 Atk. 104.

12. A creditor of a bankrupt who has his debtor in execution must elect to proceed at law or under the commission.

25 Mar. 1751, cor. Hardw. C.
Ex parte Williamson, 2 Vef. 251.

13. Where a person *chooses himself* an assignee, it is doubtful whether this is not making an election to proceed under the commission; but on the assignee electing in court to proceed at law, his lordship made an order that he should be discharged as a creditor under the commission, but still be allowed to assent or dissent to the certificate.

7 Aug. 1751, cor. Hardw. C.
Ex parte Dorwillers, 1 Atk. 221.

14. Where a party has clearly distinct demands on a bankrupt, he may sue for one, and come under the commission for the other; but not, if they are only different securities for the same debt.

P. 1783, cor. Lds. Comrs.
Ex parte Crincox,
1 Bro. Cb. Ca. 270.
Vide Ex parte Botterell,
1 Atk. 109.
Ex parte Ward, 1 Atk. 153.

15. Six months after bankruptcy, a creditor, who had the bankrupt in execution on judgment, petitioned for an account, and to be admitted under the commission. An account was ordered, but the dividend to be reserved to the extent of the verdict. A few days after he was ordered to elect in a fortnight.

T. 1790, cor. Thurlow, C.
Ex parte Hopkinson,
1 Vef. jun. 159.
Vide Ex parte Lewis, 1 Atk. 153.
Ex parte Ward, 1 Atk. 154.

S. C. *Quere*, whether a creditor may wait a reasonable time for a dividend, or must elect immediately?

The present practice seems to require that a dividend should be declared before a creditor can be compelled to elect, or that the assignees should have funds to make a dividend.

16. Bankrupt was arrested *before* the commission issued against him, and was charged in execution *after* he was declared a bankrupt; he conformed, and obtained his certificate. His creditor afterwards petitioned to prove under his commission, but

M. 1790, cor. Thurlow, C.
Ex parte Warder,
3 Bro. Cb. Ca. 191.
H. 1791, cor. Thurlow, C.
Ex parte Caton,
3 Bro. Cb. Ca. 216.
Ex parte Rattray,

10 Aug. 1791, S. P.
Note; A creditor having taken
 a bankrupt in execution *subse-*
quent to the commission, and af-
 terwards released him, was permitted to prove. *Vide Ex parte Biffon*, 23 Mar. 1792.

17 Nov. 1792, cor. Lds. Comrs.
Ex parte Wright, 2 *Ves. jun.* 9.
Vide Attorney-General v. Sparks,
 Amb. 201.
In re Lowe, 2 Blackst. 1317.

but was denied; for the charging him in execu-
 tion was deemed a conclusive election, and a sa-
 tisfaction of the debt.

Vide Ex parte Biffon, 23 Mar. 1792.

17. A creditor, three years and a half after
 receiving a dividend, on refunding, was permitted
 to proceed at law against the bankrupt. So against
 bail put in after the commission was abandoned;
 but not if they were surprised; as where after bail
 put in, plaintiff sought relief under the commission,
 on which account they had neglected to surrender
 their principal, and he absconded.

31 Nov. 1795, cor. Loughb. C.
Ex parte Callow, 3 *Ves. jun.* 1.

18. Defendant at law having lain two months
 in prison was made a bankrupt, and discharged
 under a *superfedeas*, the plaintiff not having pro-
 ceeded for two terms. The plaintiff then proved
 his debt under the commission, and before a divi-
 dend took the bankrupt in execution in a fresh
 action. The bankrupt's petition for the plaintiff
 to release him was dismissed.

Sec. 17. Where a Trustee, Executor, Factor, or Agent becomes a Bank- rupt.

H. 1695, Canc.
Wifeman v. Vanderputt,
 2 *Vern.* 203.

1. *A.* Being beyond sea, consigns goods to *B.*,
 then in good circumstances in *London*;
 but before the goods arrive becomes a bankrupt.
 If *A.* can prevent the goods coming into the hands
 of *B.* or the assignees, it is allowable, and the
 assignees shall have no relief in equity.

T. 1716, cor. Cowper, C.
Copeman v. Gallant,
 1 *P. Wms.* 314.
 2 *Eq. Abr.* 113. *pl.* 2.

2. A bankrupt though in possession, if empower-
 ed to dispose of goods in trust, they are not liable
 to the bankruptcy.

T. 1733, cor. King, C.
Golfrey v. Furze, 3 *P. Wms.* 185.

3. When a merchant beyond sea consigns goods
 to a merchant in *London* on account of the latter,
 and draws bills on him for such goods, though the
 money is not paid, yet the property of the goods
 vests in the merchant in *London* who is credited for
 them, and consequently they are (a) liable to his debts.
 But where a merchant beyond sea consigns goods to
 a factor in *London*, who receives them, the factor in
 this case being only the servant or agent for the
 merchant beyond sea can have no property in such
 goods,

(a) *Vide Snee v. Prescott*,
 1 *Atk.* 245.
D'Aquila v. Lambert, Amb. 399.
Lickbarrow v. Mason, 2 *Term*
Rep. 63., and 1 *Term Rep.*
C. B. 357., and the several cases
 there cited. *Kinlock v. Craig*,
 3 *Term Rep.* 119. 783.

goods, neither will they be affected by (b) his bankruptcy; and Lord Chancellor said, he had discoursed with merchants about the matter, who held this to be the constant practice amongst them.

4. A trader in *London* having money of J. S., who resided in *Holland*, in his hands, bought *South-Sea* stock as factor for J. S., and took the stock in his own name, but entered in his account-book as bought for J. S., after which the trader becomes a bankrupt. Determined by Lord Parker, that this trust stock was not liable to the bankruptcy.

5. Where assignees have possessed themselves of effects which belonged to the bankrupt as an executor only, the court upon application by the testator's creditors will, for the securing his effects, appoint a receiver, to whom the assignees shall account for so much as they have got in of the testator's estate.

6. Where agents abroad are in disburse for their principal, and upon being doubtful of his circumstances make bills of lading to their own order indorsed in blank; notwithstanding these bills of lading come to the principal's hands, yet if the agent's partner in *London* writes them word that their principal is become bankrupt, and desires them to send the bills of lading, and an order to the captain to deliver the goods to him, he may retain them for himself and company, against the assignees under the commission, till paid and reimbursed so much as the partnership is in advance.

A factor, who sells goods for a principal, may bring an action in the name of the principal against the vendee, and make himself a witness: or a vendor of goods to a factor, for the use of his principal, may maintain an action against the principal, and the factor be a witness for the vendor.

If goods are delivered to a carrier, &c. to be delivered to A., and are lost by the carrier, &c. the consignee only can bring the action: but if before delivery consignor hears A. is likely to become a bankrupt, or is actually one, and gets the goods back, no action will lie for A.'s assignees; because while in *transitu* they might be countermanded.

(b) *Ex parte Dumas*, 2 Ves. 386.
1 Atk. 232. S. C. *Mace v. Cadell*, Cowp. 233. et vide *Cope- man v. Gallant*, 2 P. Wms. 314.

3 P. Wms. 187. (n.)
Vide *Ex parte Chion*.
Cor. Parker, C. in T. 1731.

Ld. P. said it would lessen the credit of the nation to construe it liable.

31 Mar. 1742, cor. Hardw. C.
Ex parte Ellis and others,
1 Atk. 101.

Ld. H. admitted that bankruptcy does not take away the right of executorship, for there the bankrupt acts in *outer droit*; but his lordship wished to take care of the testator's effects as far as he could, and therefore appointed a receiver.

23 Feb. 1743, cor. Hardw. C.
Snes and another, Assignees, v. Prescott and others,
1 Atk. 245, 248, 249.
Vide *Green*, 143, 144, 148.
2 Ves. 674. Blackst. Rep. 104.
2 Blackst. Rep. 1154, 1155.
Vide *Wiseman v. Vandeputt*.
2 Vern. 203.
Ex parte Clare, cor. Ld. King.
Ex parte Frank, cor. Ld. Tabb.

Mr. Lutwyche, an experienced practitioner in Chancery, always filled up his indorsement in that manner.

Notes or bills indorsed in this manner, *Pay the money to my use*, will prevent their being filled up with such an indorsement as passes the interest.

The reason the law goes upon in compelling an original proprietor of goods after delivery to come in as a creditor under a commission, must be on account of the general credit a bankrupt has gained by having them in his custody.

1 Aug. 1744, cor. Hardw. C.
Ex parte Marlb., 1 Atk. 159.
Ld. H. said—This statute is so strictly penned, it is hardly possible to put a meaning upon some of the clauses.

7. The clause in 21 Jac. 1. which says, *that all goods in the possession of a bankrupt, whereby he gains a general credit, shall be liable to his creditors*, relates to goods the bankrupt has in his own right only.

23 Dec. 1748, cor. Hardw. C.
Ex parte Flyn and another,
1 Atk. 185.

8. One *Matthews* sold to one *Flyn* and *Field* two-thirds of five hundred barrels of tar, at the rate of 9 s. per barrel, and the other third he agreed should go and be consigned to them for sale at his risk and on his own account, and that he should be at the charge of cartage and portage, and shipping of the whole. *Matthews* accordingly caused the tar to be put into a warehouse or cellar of his own for the purposes of the agreement. *Flyn* and *Field* at the same time paid *Matthews* in London bills 150 l., the amount of two-thirds, and *Matthews* made them out a bill of parcels. *Matthews* afterwards becomes a bankrupt, and the assignees take possession of the tar, as they found it remaining in his warehouse. This was held not to be within the intent of 21 Jac. 1. c. 19. which meant to guard against leaving goods in the possession, order, and disposition of bankrupts; it being but a mere temporary custody till *Flyn* and *Field* had an opportunity of shipping it off to Ireland; and they are entitled to two-thirds of the tar.

3 Aug. 1749, cor. Hardw. C.
Ex parte Butler and another,
Assignees,
1 Atk. 210, 212, 213, 214, 215.
Amb. 73.

9. Where a bankrupt is an executor and residuary legatee, and has paid the debts, and particular legacies out of part of the assets, if he refuses to collect in the rest, notwithstanding the assignees have not the legal interest vested in them, the court would assist them to get in the remainder in the name of the executor.

9 Aug. 1754, cor. Hardw. C.
Ex parte Dumas, 1 Atk. 234.
Factors were excepted out of
21 Jac. 1. for the sake of trade.

10. Where goods consigned to a factor continue in specie, and are found in his hands at the time of his bankruptcy, the principal is entitled to them, and not the creditors at large.

This was determined in C. B. but Ld. H. could not remember the name of the case.

S. C. Where goods so consigned were sold, and the factors took notes instead of money, the principal was held entitled to the notes.

11. Bills sent by a correspondent abroad to a merchant here, with directions *to apply the money to a particular use*; the merchant becomes bankrupt before the money is received. Held, the correspondent has a special lien in the money, and it shall not be divided amongst the creditors at large. *Alister*, where the bills are sent on a general account.

21 Feb. 1756, cor. Hardw. C.
Ex parte Ourfell, Amb. 297.
Vide Ex parte Dumas, 294.

12. Bills drawn by a merchant in *Pennsylvania* on a correspondent in *England*, who becomes bankrupt; several of the bills were accepted before the commission, but protested for non-payment, being due after the commission. By the law of *Pennsylvania*, in case of such a protest on bills drawn on any person within the province, the drawer shall pay the bill, and 20 *per cent.* for damage; the plaintiff who was the drawer, having paid or being liable to pay the bills, and the 20 *per cent.* to the holders, was held entitled to prove the 20 *per cent.* as well as the bills under the commission.

6 July 1768, cor. Camden, C.
Francis v. Rucker & al.
Amb. 672.
Vide Ex parte Todd, 3 Will. 294.
Macarty v. Barrow, 2 Str. 949.
But better reported 3 Will. 27.

Sec. 18. Of Annuities under Commissions of Bankruptcy.

1. **W**HERE an annuity is secured by a deed of covenant, and a bond is likewise given as an additional security, and forfeited for non-payment before the bankruptcy, the creditor is not obliged to prove under the commission, but may proceed at law for a breach of covenant, notwithstanding the bankrupt has obtained his certificate.

T. 1723, cor. Parker, C.
Fletcher v. Bathurst,
7 Vin. Abr. 71. pl. 4.
2 Eq. Abr. 107. pl. 10.
Vide 4 Burr. 2446. *Cotterell*
v. Hooke, Dougl. 93.

2. C. in 1720 gave 300 *l.* for an annuity of 30 *l.* *per ann.* for her life, payable out of a person's estate who becomes a bankrupt in 1738. Lord Chancellor referred it to the commissioners to settle the value of her life, and directed that she should be admitted a creditor for such valuation, and the arrears of her annuity, and not for the whole 300 *l.*

1 Aug. 1738, cor. Hardw. C.
Ex parte Le Compte, 1 Atk. 251.
2 Blackst. Rep. 1106.
2 Vef. 490.

3. Where a bankrupt is under an agreement with a penalty to pay an annuity, a value must be put upon it after the penalty has become forfeited, and that value is proveable as a debt under the commission.

1 Aug. 1744, cor. Hardw. C.
Ex parte Bellon, 1 Atk. 151.

4. Where

2 Aug. 1752, cor. Hardw. C.
Ex parte Artus, 2 Ves 490.
Vide Ex parte Burrow,
 1 Bro. Ch. Ca. 268.

In this valuation consideration
 must be had to the time the an-
 nuitant has enjoyed his annuity.

22 Jan. 1753, cor. Hardw. C.
Ex parte Coffigame, 1 Atk. 192.

It appeared that the bankrupt's
 wife brought him a portion of
 500 l. and had nothing to sub-
 sist upon but this annuity.

P. 1783, cor. Lds. Comrs.
Ex parte Barrow,
 1 Bro. Ch. Ca. 268.

P. 1783, cor. Lds. Comrs.
Ex parte Catbr,
 1 Bro. Ch. Ca. 267.

4. Where there is a general personal annuity upon a bankrupt's estate, which is not a rent-charge upon land, or upon any specific part of his estate, but a personal annuity payable out of his stock generally, there is nothing due from his estate but the arrears of the annuity at the time of the bankruptcy, unless the penalty of the bond has become forfeited, for otherwise the accruing payments become a debt after the bankruptcy, and cannot be proved: and where the annuity bond has become forfeited, the course is to set a value of the annuitant's life interest, and he is admitted a creditor for that value.

S. C. But where an annuitant is a creditor by decree also, then the deficiency is to be made good out of the capital.

5. A bond given to A. in trust to secure the payment of an annuity of 40 l. *per annum* during the joint lives of Sir Edward Smith and petitioner, the bankrupt's wife; he delivers up the bond upon his last examination; she applies to the court, and prays the assignee may deliver the bond to her trustee, and that the arrears of the annuity and all future payments may be made to her. Lord Chancellor ordered it accordingly.

6. Creditors upon annuity bonds not allowed to prove their debts, unless the penalties of their bonds were forfeited at law before the bankruptcy.

7. A special meeting of creditors was directed to be called to consider whether the assignees should object to the annuitant's proving on the ground of inadequate consideration, the annuities having been bought at five years purchase, and the assignees having consented to the proof.

Sec. 19. Of a Surplus after dividing Twenty Shillings in the Pound.

4 Nov. 1743, cor. Hardw. C.
Bromley and others v. Goodere,
Assignees, 1 Atk. 75. 77. 80.

1. **W**HERE a bankrupt's estate is sufficient to pay all, with a large surplus, creditors whose debts carry interest shall be allowed interest for their respective debts from the time the computation of it was stopped by the commissioners; but such as are creditors by bond, not beyond their penalties.

S. C.

S. C. The proof of a debt before commissioners, unless an objection made in a reasonable time, is conclusive, and the bankrupt's representatives are bound by it.

2. Upon a bankruptcy, there being a surplus after dividing to the amount of the whole principal, with interest to the suing out the commission, subsequent interest was ordered on the petition of bond creditors, saving just allowances: the commissioners might give it without order *, and need stop at nothing but want of assets; but no † compound interest allowed.

20 Ap. 1790, cor. Thurlow, C.
Ex parte Morris, 1 Vef. jun. 133.
3 Bro. Ch. Ca. 79.

* Vide Bromley v. Goodere,
1 Atk. 75.
† Waring v. Cunliffe, 1 Vef.
jun. 99.

3. The creditors of a bankrupt are entitled to interest in case of a surplus.

T. 1790, cor. Thurlow, C.
Ex parte Goring, 1 Vef. jun. 170.

4. There being a surplus of a bankrupt's estate, interest was allowed to creditors, where by course of trading and settling accounts interest was allowed after a certain credit.

H. 1792, cor. Thurlow, C.
Ex parte Champion,
3 Bro. Ch. Ca. 436.
Vide 13 Eliz. c. 7. s. 4.
1 Jac. 1 c. 15. s. 15.

Ex parte Rooke, 1 Atk. 244. Ex parte Hyde, Dec. 1783. Ex parte Morris, 3 Bro. Ch. Ca. 79.

5. Interest allowed to be proved on the bankrupt's note to bankers, not reserving interest, there being a surplus of the bankrupt's estate after payment of twenty shillings in the pound.

H. 1792, cor. Thurlow, C.
Ex parte Hankey,
3 Bro. Ch. Ca. 504.
Note; The cases Ex parte
Champion and Ex parte Hankey
were confirmed on rehearing.—

In cases of a surplus, where the overplus consists of real and personal estates, the personal is to be first in payment of interest on debts carrying interest; and if that is deficient, the real estate must come in aid.—But where the real and personal estate are more than sufficient to pay the debts with interest, and the bankrupt is dead, the surplus real must be conveyed to his heir at law, and the personal divided amongst his next of kin. Vide Bromley v. Goodere, 1 Atk. 80.

6. In case of a surplus, creditors have a right to interest, wherever there is a contract for it, appearing either on the face of the security or by evidence.

23 Dec. 1793, cor. Loughb. C.
Ex parte Mills, 2 Vef. jun. 295.

S. C. Under bankruptcy, no interest allowed beyond the penalty of a bond.

S. C. Where debts did not carry interest by the contract, the court made the bankrupt pay the contribution out of the surplus.

B—a

Banishment.

T. 1689, cor. Lds. Commrs.
Countess of Portland v. Progers,
 2 Vern. 104.

3 Eq. Abr. 65. pl. 3. 174. pl. 1.

(a) By 34 & 35 H. 8. it is declared in express words, that a devise of any manor, lands, &c. by a feme covert, infant, idiot, or non compos, is not good, and that such only as have a sound and disposing memory can devise. *Vide* Marquis of Winchester's case, 6 Co. 23. Cranvel and Sander's case, Cro. Jac. 497.

Note; The legatees under Lady Sandy's will, whose husband was banished, were decreed their legacies, 1 Eq. Abr. 171. pl. 1. (x). Banishment can only be by act of parliament, dict. per Lord King in *Newsome v. Bowyer*, 3 P. Wms. 38. as laid down in the case of Thomas de Wayland, 1 Inst. 133. *Vide* also Lady Belknap's case, 1 Inst. 132. *Durly v. Ducheys of Mazarine*, 1 Salk. 116. *Sparrow v. Carruthers*, 2 Bl. Rep. 1197.

A WIFE whose husband is by act of parliament banished for life, may make a will (a), and in every thing act as a feme sole, and as if her husband was dead, the necessity of the case requiring she should have such power.

B—a

Bank of England.

T. 1784, cor. Thurlow, C.
Birch v. Corbyn,
 3 Bro. Ch. Ca. 571.

1. PLAINTIFF filed his bill, claiming an equitable lien on stock, (purchased with A.'s remittances from *Virginia*), in respect of money paid by plaintiff for the education of A.'s sons, and charging that such remittances were to satisfy plaintiff's demand. The stock stood in trustees' names, but the Bank refused a transfer. On motion by defendant that the Bank might be ordered to transfer, Lord Chancellor said, this was requiring a decree by an interlocutory order; for defendant undertook to prove plaintiff had no lien, as appears by his answer. It is impossible to order a stakeholder to quit the stakes.

T. 1786, cor. M.R. abf. C.
Williams v. Williams,
 2 Bro. Ch. Ca. 87.

2. The Bank of *England* were made parties to a bill, and as against them a discovery was prayed what sum an executrix had transferred into her own name, the Bank were brought on to a hearing. His Honour thought this an unnecessary expence, and said, that although in practice the service of a subpoena on the Bank operated as an injunction, by preventing their transfer, yet it was not so in law, as the subpoena served could not be an answer to an action for not permitting a transfer, though an injunction would; and his Honour declared it improper to bring the Bank to a hearing. Bill dismissed with costs as against the Bank.

3. Stock

3. Stock in the bank being given by will to *A.* for life, remainder to *B.*, and *A.* having bought *B.*'s remainder, they joined in an application to the Bank to permit a transfer; the Bank refusing, a bill was filed; whereupon the Bank was ordered to transfer, and to be paid their costs.

H. 1789, cor. Thurlow, C.
Pearson v. Bank of England,
2 Bro. Ch. Ca. 519.

4. Though a residue is specifically devised, the Bank has no right to restrain the executor from transferring the funds. Injunction dissolved.

T. 1791, cor. Thurlow, C.
Bank of England v. Moffatt and others,
3 Bro. Ch. Ca. 260.

5. Bank-stock was specifically bequeathed to *A.* in trust to pay a bond debt to himself; and as to the rest, to *B.* for life, remainder over: *A.* the trustee being also executor, transferred to persons not entitled under the will. The Bank is not chargeable. Bill dismissed as against them.

26 Feb. 1796, cor. Loughb. C.
Hartig v. Bank of England,
3 Ves. jun. 53.

prevent a transfer into the name of the executor, and when once the stock stood in his name he might transfer to others. It is required, for the protection of the Bank against a specific legatee, that the clause in the will shall be fully set forth to the Bank; if that is omitted, it is at the peril of the party.

Lord Chancellor said, if the Bank were to be responsible in this case, they would be chargeable with all the trusts in the kingdom. The Bank could not

6. The court ordered the dividends of money in the bank on the testator's account to be paid according to the trusts of his will, but could not order the Bank to transfer * where the trustee refused to answer.

T. 1796, cor. Loughb. C.
Shaw v. Wright,
3 Ves. jun. 22.

jurisdiction, as well in cases of infant trustees as where executors or trustees are abroad or obstinate, that the Bank should transfer as the court should order them. And in consequence of what fell from the Lord Chancellor in this case, the statute of 36 G. 3. c. 90. was made to remedy the inconveniences complained of, and give the court further jurisdiction.

* Lord Chancellor observed in this cause, that it would be a great accommodation and well worth while to give the court

Baron and Feme.

Sec. 1. Of the Estates and Interests of the Husband, and how far the same are liable to an Account for the Produce of the Wife's Estate received by him during Coverture.

1. A Woman seised in fee of lands charged with specific debts, marries; the husband receives the rents, but does not pay the interest of the debts; the wife dies without issue. On a bill by her heir, decreed the husband ought to have kept down the interest, and not suffer the debt to increase; he must therefore account accordingly.

M. 1706, Canc.
Brompton v. Alkis, 2 Vern. 566.

The reporter has said "Quære tamen" to this decree.

P. 1789, Canc.
Harrison v. Constantine,
 2 Eq. Abr. 147. pl. 1.

2. Plaintiff was the widow of one *H.*, who before her marriage was seised of an estate of 100 *l.* *per annum*, and possessed of several household and other goods. *H.* before marriage entered into articles, wherein he covenanted with his intended wife and trustees, that she should receive the profits of her own estate to her separate use, and that he would give acquittances for such receipts, and that she should have the disposal of all her own by her will or other writing during the coverture. He also covenanted to leave her a legacy of 500 *l.*, and to settle some lands upon her in tail, with remainder to her right heirs. Both parts of the articles were put into the hands of an indifferent person; and soon after the marriage the husband demanding his part, which was signed by his wife, the trustees, through a mistake, delivered to him that part which was signed by himself; *H.* then looking upon himself to be free from the agreement, became a very bad husband; and though he and his wife agreed to live in the same house, yet they kept separate tables, and both were maintained at the expence of the husband, who during the coverture received the profits of his wife's estate. Not long before the husband's death, the wife was prevailed upon to join with her husband in passing a fine of some of her own lands. Upon this fine the lands were mortgaged for money which the husband had borrowed, and then settled to the wife in tail, with the fee to the husband. The mortgage-money was all repaid except a very small sum. *H.* conveyed all the land away that he had settled by the articles upon his wife; he then made his will, and died. The widow now brought her bill against her husband's executors, to have an account of the profits during coverture, and for a satisfaction of the goods the husband had consumed. Decreed, that no account should be taken of the estate of the wife during the coverture, nor for the goods consumed by the husband; but if the Master shall find any of the goods claimed under the articles, they to be delivered up to the wife, because the husband and wife, notwithstanding the differences, cohabited together; and no complaint was ever made by the wife to the trustees, nor any step taken by her in order to remedy herself. Besides, she was maintained by her husband, and the differences had their interruptions; for at the time when the fine was acknowledged she was well pleased with her husband, and had forgot all former feuds; therefore

no notice is to be taken of what was before, and there is no proof of any difference that arose afterwards. The residue of the articles are to be performed to the widow; and because the lands covenanted to be settled upon her are conveyed away, let lands of equal value be purchased, and the husband's assets chargeable. The executors prayed a direction as to the wife's estate which was mortgaged, and hoped the wife should pay off what mortgage-money remained undischarged. But the husband being the principal debtor, the executors were decreed to pay it.

3. The wife before marriage, with the consent of her intended husband, conveyed her real estate to trustees, to such uses as she should notwithstanding her coverture appoint, and assigned all her mortgages and bonds to her separate use. After marriage, the wife constantly permitted her husband to receive the interest of all these securities and bonds: also the wife consented to sell 10*l.*, part of her inheritance, for 200*l.*, which the husband received, and therewith founded a charity for widows, giving a bond to the trustees for the 200*l.*, payable three months after his wife's death. Decreed, that as to the principal money due on the mortgages and securities, the husband's executors must make that good out of his assets, with interest from his death; but as to the interest received by the husband during the coverture, with the wife's consent, it must be construed as a gift, the wife having participated in the enjoyment of more plentiful living during the coverture; if the husband was to be considered as a debtor for all his receipts of the interest-money, it might ruin his estate, and prejudice his children. As to the case of separate maintenance, the husband supporting his wife barred her claim in this respect (a); for if she was not contented that her husband should receive her money and maintain her, she might complain to her trustees. As to the wife's accepting her husband's bond for 200*l.*, payable after her death, for the use of her executors, this waived the interest during her life, and she does not attempt to avoid the bond by a charge of fraud in gaining her acceptance of it. This being her separate estate, she must here be considered a feme sole (b). Besides, it was reasonable to suppose she should contribute to the charity founded by her husband for the

M. 1722, cor. Maclesfield, C.
Powell v. Hanky, 2 P. Wms. 82.
2 Eq. Abr. 151. pl. 11.

(a) *Vide Thomas v. Bennet*, 2 P. Wms. 341. where it was determined that arrears of pin-money were not recoverable, the husband and wife having cohabited together, and the wife being maintained by her husband; and in *Fowler v. Fowler*, 3 P. Wms. 355. it was held that the husband providing clothes and other necessaries for his wife is a bar to her claim of pin-money during that time.

In *Lord Townsend v. Windham*, 2 Vef. 7. and *Peacock and Monk*, 2 Vef. 190. the general rule is said to be that an account of pin-money shall not be carried beyond the year; yet otherwise in the *Countess of Warwick and Edwards*, 1 Eq. Abr. 140. pl. 7. *Ridout v. Lewis*, 1 Atk. 269.

(b) *Vide Allen v. Papworth*, 1 Vef. 163. *Grigby v. Cox*, 1 Vef. 517. *Hulme v. Tennant*, 1 Bro. Ch. Rep. 16. *Pybas v. Smith*, 3 Bro. Ch. Rep. 340.

benefit of widows in so small a degree; so that there is the more cause to decree she should be bound by this bond.

T. 1723, cor. M. R.
Bertie v. Ld. Chesterfield,
 9 Mod. 31.
 2 Eq. Abr. 112. pl. 15. 483. pl. 2.
Vide 1 Vern. 343. 309. 326.
 2 Com. Dig. Ch. 2 M. 7.

5 Ap. 1744, cor. Hardw. C.
Beard v. Beard, 3 Atk. 72.

4. The estate of a deceased husband in the hands of another is subject to the funeral charges of his wife, though she had a separate maintenance which she disposed of by will.

5. A freeman of London being at variance with his wife, in January 1739, by his will, executed at a tavern, gives all his real and personal estate to his brother, and makes him executor. In November 1740, by deed-poll, he gives and grants all his present and future substance to his wife. The wife brought her bill, insisting that the deed-poll was a revocation of the will. *Per cur.*—A man cannot make a grant to his wife in his lifetime, being contrary to law, nor will the court of Chancery suffer her to have the whole of his estate whilst living, for it is not in the nature of a provision, which is all the wife is entitled to.

12 Nov. 1770, cor. M. R.
Jackson v. Parker, Amb. 687.
Vide Southcoat v. Manorie,
 Cro. Ellis. 744. which afterwards
 came on again naming Willmot v.
 Knowles, Mo. 680. Lord and
 Lady Huntingdon's case, Mo.
 408. *Brend v. Brend*, 1 Vern. 213.
Pocock v. Lee, 2 Vern. 604.

6. Husband tenant in tail, and his wife, join in a mortgage of the husband's estate by lease and release, and fine; the proviso reserves the equity of redemption to the husband and wife, and their heirs, &c.; but the latter part of the deed declares the uses of the fine after payment of the mortgage to the husband and his heirs. The husband dies. Held, the husband was solely entitled to the estate, and that the wife had the power of redemption only to secure her dower.

P. 1786, cor. M. R.
Pitt v. Jackson,
 2 Bro. Cb. Ca. 51.

7. A treaty between husband and wife relative to the purchase by the husband of the wife's separate estate, but not carried into execution during their lives, shall not be executed after the death of the parties; but the husband's personal estate shall be liable for rents and profits received by him: and that estate descending to the children, as heirs of their mother, they shall elect as between it and their claims under the father's will.

3 Nov. 1792, cor. Lda. Comrs.
Bird v. Lefevre,
 4 Bro. Cb. Ca. 100.

8. On a petition that a fund in court, (belonging to the husband,) or the interest of it, should be paid to the wife for the maintenance of himself and family, the husband (though not a lunatic) being in a state of great imbecility of mind. The interest was ordered to be paid accordingly.

9. In

9. In an account directed against the husband's estate of dividends of the wife's separate property received by him, consideration was had of his *extra* expence of maintaining her, in consequence of her being a lunatic.

T. 1793, cor. Thurlow, C.
Attorney-General v. Parniter,
4 Bro. Ch. Ca. 409.

10. A husband receives the dividends of his wife's separate property in the funds, and applies them to the general purposes of his family; the wife survives her representatives, shall not have an account against the representatives of her husband.

18 June 1793, cor. Loughb. C.
Squire v. Dean,
4 Bro. Ch. Ca. 326.

11. A husband is not to account for the income of his wife's separate estate, which she permitted him to receive and spend.

T. 1795, cor. Loughb. C.
Smith and Lord Camelford,
2 Ves. jun. 698.

How far the husband or his estate shall be bound by his own covenants on behalf of his wife, or by his wife's engagements during coverture and cohabitation, *vide post*, sec. 6.

Sec. 2. Of the Estates, Choses en Action, or Possibilities of the Wife belonging to her before Marriage, where they shall remain unchanged notwithstanding the Coverture, and go to her Representatives, either under a Power reserved to her, by Right of Survivorship, or otherwise.

1. **M**ONEY in trustees hands for a feme covert shall go to her if she survives, and not to the executors of the husband, he having made no disposition of it in his lifetime.

P. 1683, cor. North, C. S.
Twisden v. Wife,
1 Vern. 161.
1 Eq. Abr. 68. pl. 2.

2. *A.* on her marriage had 500 *l.*, consisting of monies due to her on bond, and of some lands of inheritance in her own right. Her husband settled 45 *l. per annum* on her, and died insolvent before the bonds were altered, or any fine levied of the lands. Bill by the husband's creditors against *A.* his widow, and *B.* his executrix, to have the bonds and land made liable to the husband's debts. *Per cur.*—The widow has the title in law to the lands as her own inheritance; and as to the bonds, they were the *choses en action* of the wife, and survived to her. Bill dismissed.

T. 1688, cor. Jeffries, C.
Lyster v. Lyster, 2 Vern. 68.

Vide Twisden v. Wyld.

3. *A.* by will gives his daughter 400 *l.* and devises lands to her until *B.* his son should pay her this 400 *l.* She marries *C.*, whose father covenants

M. 1690, cor. Lds. Comrs.
Howman v. Curic, 2 Vern. 190.

to settle lands of 100 *l. per annum*, and *B.* covenants to pay the 400 *l.* to the husband, and upon payment, the lands devised to the daughter were to be discharged. The husband dies. Decreed, the 400 *l.* to the wife as her *chose en action*, and not to the executor of the husband.

M. 1698, cor. M. R.

Parker v. Dykes,

1 *Eq. Abr.* 54. pl. 6.

See more on this subject under sec. 9. *post*, where the husband and those claiming under him are bound to provide for the wife if they go into equity for her fortune.

4. A man had devised lands to trustees (which were in mortgage) to be sold, and the surplus of the money to be paid to his daughter; the daughter married a man who soon became a bankrupt, and the commissioners assigned this interest of the wife; the husband died, and the assignees brought this bill against the wife and trustees to have the land sold, and the surplus of the money paid to them; but the court would not assist, as the wife was wholly unprovided for. Bill dismissed.

M. 1700. cor. Wright, C. S.

Burnett, Esq. v. Kinnaston,

2 *Vern.* 401. 2 *Freem.* 239.

1 *Eq. Abr.* 69. pl. 5.

This case is also in *Prec.* in Ch. 118. but it is very differently stated; it is there said, "that a feme covert entitled to a mortgage in fee, her husband articles to lay out the money in the purchase of land to be settled as a provision for him and his wife and their issue; the wife dies without issue; the husband takes out administration to her (a), and by will devises this money to plaintiffs, (his children by his first wife,) and dies before the mortgage was paid off. On a bill against the administrator *de bonis non* of the wife, held there could be no relief, the law being with the defendant, to whom the money belonged as administrator *de bonis non* of the wife, and is distributable among her next of kin."

Vide *Cleland v. Cleland*, *Prec.* in Ch. 63. *Meredith v. Wynn*, *Prec.* in Ch. 312. *Lister v. Lister*, 2 *Vern.* 68. *Eyre v. Lady Shaftsbury*, 2 *P. Wms.* 111. *Grey v. Kentish*, 1 *Atk.* 280. *Humphrey v. Bullen*, 1 *Atk.* 459. *Bates v. Dandy*, 2 *Atk.* 207. *Packer v. Wynham*, *Prec.* in Ch. 417. *Adams v. Cole*, *Ca. temp. Talb.* 168 to 170. *Gilb. Rep.* 98.

M. 1702, cor. Wright, C. S.

Rudyard v. Nairn & Ux.

Prec. in Ch. 209. 2 *Freem.* 262.

2 *Eq. Ab.* 137. c. 3.

On the contrary, it is to be observed, that in all cases where a husband makes a settlement of his own estate on his wife, in consideration of her fortune, the wife's portion, though consisting of *choses en action*, and though there be no particular agreement for that purpose, is looked upon as purchased by him, and will go to his executors.

3 *P. Wms.* 199. n. *Vide* *Cleland v. Cleland*, *Prec.* in Ch. 63. *Blois v. Lady Hereford*, 2 *Vern.* 501. The same point appears to have been determined by Lord Cowper in *Packer v. Wyndham*, *Prec.* in Ch. 412.

6. A woman having 1200 *l.* in possession, and 1200 *l.* in the Chamber of London, on her marriage the husband's father, in consideration of this fortune, settled 240 *l. per annum* jointure on her. The husband dies, and the wife administers to him. The representatives of the husband's father bring a bill for the 1200 *l.* in the Chamber of London, the father being (as alledged) a purchaser of it by the settlement. Bill dismissed; for the husband having done nothing to alter the property in his life, it survives to the wife.

7. A widow having a jointure, and being executrix to her husband, and residuary legatee with her son, concludes on a marriage with the plaintiff; and by the marriage settlement he jointures several lands upon her, and also (by the same deed) the jointure lands by the first husband (which never vested in the trustees) for her sole and separate use and disposal, and likewise all the personal and testamentary estate which she had as executrix to her first husband. She had before those articles laid out part of the personal estate of her first husband in the purchase of lands for years in her own name, and afterwards she laid out more of the personal estate in purchasing the inheritance, which purchase was in her son's name: the question was, whether those lands purchased with the personal and testamentary estate of the first husband, are to be accounted as a personal estate, and so the wife to have the sole and separate use thereof, and exclude the husband therefrom? Lord Chancellor—I will not account those purchases as part of the personal estate within the intent of the marriage articles; but if she has any part of the personal and testamentary estate of her late husband's in her hands at the time of the marriage articles, that shall be reckoned part of the personal estate, although it was paid after for the purchase of those lands; for it was a personal estate at the time of the articles. Indeed, if a woman by a marriage agreement is to have the separate use of any estate during the coverture, she is to have that and the produce of it after the marriage; and if any of it is invested in a purchase, this court will follow it, looking upon it as the produce of what she ought to have.

M. 1709, cor. Cowper, C.
Eastly v. Eastly,
2 Eq. Abr. 148. pl. 2.

8. An infant feme having lands of inheritance marries A. Articles are entered into, whereby she was, during the coverture, to settle and convey these lands, and then she was to have a rent-charge of 450 l. *per annum* for her jointure, whereas before she had but 250 l. *per annum*. A. dies; she marries B.; B. and his wife bring a bill to have the 450 l. *per annum*, &c. *Per cur.*—Here was a condition *precedent* to her having her jointure augmented, which was to have been done during the coverture; and a court of equity will not relieve in such a case where the omission of it was but a mere neglect in the party (and cited *Lady Bertie's case*). On appeal to the Lords, this matter was in

M. 1710, cor. Harcourt, C. S.
Wood v. Ingram,
2 Eq. Abr. 211. pl. 3.

a manner compromised; and Lord Keeper dismissed the bill; for if he should relieve her, she would have the lands and the 450*l.* also.

M. 1715, Canc.
Anon. 2 Vern. 707.

9. A man pays contribution money upon a commission of bankruptcy for a bond debt due to his wife, and dies before a dividend made, and then the wife dies. The executors of the wife are entitled to the dividend; for the husband's paying contribution money does not alter the property of the bond, but it remains a *chose en action*, and survives to the wife; the wife's executors must however repay to the executors of the husband the contribution money paid by him.

M. 1718, cor. Cowper, C.
Ortred or Ontram v. Round,
4 Vin. Abr. 203. pl. 4.
2 Eq. Abr. 145. pl. 4.

Lord Cowper in this case said, It is a great breach upon the wisdom of the law to compel a husband to procure his wife to levy a fine and force her to part with her land without her consent. *Vide* Barrington v. Horne, 2 Eq. Abr. 17. pl. 7. where a specific performance was decreed, and Hall v. Hardy, 3 P. Wms 189. S. P. and Winter and Devereux, there cited.

10. Husband and wife, for a valuable consideration, by lease and release, conveyed the wife's land in fee, and covenanted that the wife should levy a fine of the same to the use of the purchaser. She refused to levy a fine. Plaintiff brought his bill to have his title perfected by a specific performance of the covenant, and a precedent was cited where a specific performance had been decreed in the like case, but Lord Chancellor would not decree a specific performance in this case, because upon such a decree the husband could not compel his wife to levy a fine; and if she would not comply, imprisonment would fall upon the husband for contempt, which was the ill consequence of the decree in the cited case. His lordship therefore directed defendant to refund the purchase-money with costs.

M. 1720, cor. Parker, C.
Heaton v. Hassell,
2 Eq. Abr. 467. pl. 13.
Vin. Abr. tit. Baron and Feme,
(D), in a note to ca. 11.

Lord Chancellor said the case was so very clear that defendant's counsel need not argue it. Creditors in this case cannot be in a better condition than the executors of the debtor; and can it be imagined that if another person had been made executor to the husband, and such executor had brought a bill against the wife to compel her to assign this bond, that the court would have decreed for the executor? What the law gives the husband by the intermarriage is a good consideration for making a settlement, but the husband's making a settlement

11. Defendant had lands to the value of 700*l.*, and also 500*l.* due to her upon bond, which remained in D.'s hands. Her husband before marriage makes a settlement, and in consideration of a considerable portion with his intended wife, he *does grant*, &c. but the particulars whereof her portion consisted did not appear by the deed; and the question was, if this bond to the defendant for 500*l.*, part of her portion, (being a *chose en action*, and not called in by the husband,) should be assets in equity to satisfy a debt of the husband, the wife having enjoyed the benefit of the settlement made to her out of her husband's estate, which would have been liable to the debts? Decreed, an account to be taken of the husband's assets, but not of this 500*l.* bond.

does not vest in the husband the *chose en action* of the wife, unless it be expressly so agreed between the parties, and that appears to be part of the consideration of the settlement; for then the husband is a purchaser, and well entitled to them in a court of equity.

§ 2. *Feme's Estate unchanged by Marriage.*

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12. An agreement by the husband to sell his wife's estate, shall not bind her, or be carried into execution without her consent

15 Feb. 1721, Dom. Proc.
Bryan v. Woolley,
2 Bro. P. C. 387.
4 Vin. Abr. 57. c. 19.
2 Eq. Abr. 132. c. 3.
2 Eq. Abr. 55. n. to pl. 1.

Equity will not carry unreasonable bargains into execution. *Vide* 2 Eq. Abr. 55. n. to pl. 1.

13. A bond given by the husband before marriage, to permit his wife to dispose of her separate estate, and cancelled by him, subsists in point of law; and the benefit of it was decreed for her executor.

11 July 1725, at the Rolls.
Cowey v. Richardson, MS. case.
Reg. Lib. A. 491, 492.
cited in *Pawlet v. Delaval*,
2 Vef. 669. — *Vide* *Smith v. Avery*, 1 Eq. Abr. 269. pl. 9.

14. Where a power is given to a woman to dispose of her estate by will, and she afterwards marries, it was decreed in equity that the marriage is a suspension of her power; but if she survives the husband, her power revives, *Sed quare*, for the Lords directed a case for the opinion of the Judges of B. R., and that on the return of such opinion to the court of Chancery, that court should proceed to make such further order as should be just.

ordering the Judges to attend, and calling for their opinion in the usual way. And in *Hearle v. Greenbank*, 3 Atk. 707. Ld. Hardwicke said, that "this was the only instance of a case made by the direction of the House of Lords for the opinion of the Judges." But it is still more extraordinary that after such a case was directed, no steps should have been taken on either side to have it argued. Not a single trace appears of any further proceedings in the cause, except an order of the court of Chancery directing the case to be settled by the Master, in case the parties differed in stating it.

9 Feb. 1727, Dom. Proc.
Rice v. Beaumont & al.
3 Bro. P. C. 308.
4 Vin. Abr. 168. pl. 26.
2 Eq. Abr. 157. pl. 4.
22 Vin. Abr. 277. pl. 47.
2 Eq. Abr. 753. pl. 2. S. C.
but not S. P.

Note; It seems rather singular that the House should on this occasion direct a case for the opinion of the court of B. R. instead of

15. By articles made previous to the marriage of a female infant, and in consideration of 3500 l. then paid to the husband, it was agreed that in consideration of a suitable jointure to be made by the husband after the wife should come of age, and in bar of her dower on his estate, she should convey her lands to be limited to him in fee. The jointure was accordingly settled, and the wife (being of age) was a party to the deed, but she never conveyed her own estate, nor was she ever required by her husband so to do (a). The husband died, and the wife entered upon the settled lands. Held, she was not bound by the articles, and her acceptance of the jointure did not amount to a confirmation of them. She therefore kept her own estate and the jointure also.

(a) It appeared in this case that the wife's dower on the husband's lands amounted to more than her jointure, which accounts for the husband's not calling upon her to convey her own estates.

M. 1728, cor. King, C.
Lucy v. Moore, Esq. & al.
Mof. 59. affirmed in Dom. Proc.
21 Ap. 1730, 3 Bro. P. C. 514.
Vide *Cannel v. Buckle*,
2 P. Wms. 243.
Price v. Seys, Barnard. 122.
Seamer v. Bingham, 3 Atk. 56.
Harvey v. Ashley, 3 Atk. 607.
Earl of Bucks v. Drury,
4 Bro. P. C. 570.
Dunford v. Lane,
1 Bro. Ch. Ca. 106.
Williams v. Williams,
1 Bro. Ch. Ca. 152.
Slocumb v. Glubb,
2 Bro. Ch. Ca. 545.

16. Where the husband for a valuable consideration covenants that his wife shall join with him in a fine of the wife's freehold estate, equity will enforce a performance of such covenant.

T. 1733, cor. Jekyll, M. R.
Hall v. Hardy, 3 P. Wms. 189.
2 Eq. Abr. 28. pl. 35.

Note; Equity enforces the performance of such covenants under a presumption that the husband, before he covenanted, had obtained his wife's consent.

But

3 *P. Wms.* 189. *N.*
Winter v. Devereux,
T. 1723, cor. *M. R.*
Vide Barrington and Horne,
 2 *Eq. Abr.* 17. pl. 7. *S. P.*
Ortved v. Round,
 4 *Vin. Abr.* 203. pl. 4.

But if it can be made appear to have been impossible for the husband to procure the concurrence of his wife, (as suppose there are differences between them,) and the husband offers to return all the money with interest and costs. *Quere*, If under these circumstances the husband would not be excused?

29 *Ap.* 1741, cor. *Hardw. C.*
Grosvenor v. Lane, 2 *Atk.* 180.

17. *P.* gives a third of a moiety of the residue of his personal estate to his daughter *S. P.*, who marries; and whilst out of the kingdom assigned (together with her husband) this third of a moiety which was to arise out of *P.*'s estate, in trust for their daughter, provided they died before they came to *England*. *S. P.*'s first husband died, and before the money was reduced into possession she married a second, who survived her. *If she had continued a widow, she would have been entitled to a decree for this third, and no notice would have been taken of the daughter's interest.*

P. 1742, cor. *Hardw. C.*
Horner v. Bendloss, 9 *Mod.* 335.

18. If a feme sole having 1400 *l.* stock, convey it to trustees to the use of her intended husband and herself for life, with power to dispose of 200 *l.*, this power survives to the wife on the death of her husband.

21 *June* 1743, cor. *Hardw. C.*
Seamer & al. v. Bingham,
Strode v. Strode, 3 *Atk.* 54.

19. *A.* by deed, on the marriage of *B.* his son, settles the estate in question on the issue male of *B.*, and if no issue male, then he directs the estate to be sold, and the produce divided equally among the daughters of *B.* By deed of 29th *April* 1702, *B.* directs the estate to be sold, and the produce to be divided among his six daughters, provided he should have no son. After the marriage of *C.*, one of the daughters of *B.*, to *D.*, by deed of 7th *October* 1714, between *D.* and *C.* his wife of the one part, and *B.* of the other part, reciting the deed of 29th *April* 1702, *D.* covenanted that all such right in land or money as should accrue to *C.* in her lifetime, or to *D.* in her right by virtue of the recited deed, should be vested in three persons (who were also parties to the deed in 1714) upon trust to put out the share of *C.* in the produce of the estate so to be sold on security, and to pay the interest thereof to *D.* for life, then to *C.* for life, and after the death of the survivor, then the principal to be divided among the children of the marriage equally, with benefit of survivorship, (except such issue male as might be immediately inheritable to the lands, &c. who were to take only in failure of other issue,)

issue,) and if no children, then to the survivor of C. and D. absolutely. There was one son of this marriage, E. who survived his father, and became of age, and then died in the lifetime of his mother, who married F. G. the heir of E. insists that the interest of C. ought to be deemed real estate, and that it vested in E. in nature of a remainder after her death, and descended to him as heir at law. Plaintiffs are the children of D. by a first ventre, and half sisters of E., who insist that the share of C. must be considered as money; that it vested in E., and was transmissible to his personal representatives. Defendants insist that C. was no party to the deed in 1714, and therefore could not be bound thereby; that she was a feme covert and an infant, and that the deed was executed after her marriage, and was merely voluntary. The questions were, 1st, whether by the deed in 1714, executed the day after the marriage of C. and D., the property of C. was bound as to her share of her grandfather's estate? 2dly, If it did not bind her, whether her executing a deed on her second marriage in 1738, which recited the deed in 1714, and that C. was a party, and that she thereby secured her interest in that deed as a provision for her children and herself if she survived, was an acquiescence and bound her? And, 3dly, If it did not bind her, what was the construction of the trusts in the deed of 1714? As to the two first questions, Lord Hardwicke would give no opinion, but he thought C. was not bound. If it was real estate, all the questions would be out of the case; but it must be considered as money, for it was directed to be sold (a). *Decreed* the estate mentioned in the deed 1702 to be sold, and the produce to be divided into six parts, as the several shares of the six daughters of B., the seventh having died without issue, and unmarried; and as to the question of the share of C., first married to D., and then to F., whether it should belong solely to her as having survived her first husband D., and all the children of that marriage? *Decreed*, that it belonged solely to C.

(a) The rule is, that land to be turned into money is money. But there are cases where persons may insist on the land itself, as where the parties all agree that the land shall not be sold, and none of the claimants oppose it.

20. A widow seized in fee of copyhold lands, M. 1749, C. B. Worcester Sum. surrendered them to the use of her will. Afterwards, previous to a second marriage, her intended husband entered into articles, by which he agreed that she should have power to settle or devise her estate during coverture. After marriage she and her husband mortgaged the estates for 99 years, but
no

Affixes.
George ex dem. Thornbury
v. —, Amb. 627.
1 Eq. Abr. 61.

* *Vide Wright v. Lord Cadogan*, 6 Bro. P. C. 156. *Rippon v. Dawding*, Amb. 565. *Bramhall v. Hall*, Amb. 467.

(a) By custom the surrender of a feme covert with the assent of her husband is good. Mo. 123. cited in 2 Bro. Ch. Ca. 387.

(b) The court compared this surrender to a presentation, which is revocable and fluctuating till induction.

(c) And of consequence no interest can vest in the defendant. The lord can never be considered a trustee in whom the land is to vest for the benefit of the devisee; for it appears plainly by Poph. 174. 4 Co. 23. and Cro. Eliz. 441. that whenever the fee-simple, &c. of a copyhold is by surrender limited to the use of a will, the fee-simple remains in the copyholder, and is not vested in the lord, therefore he cannot be considered as a trustee.

22 May 1750, cor. Hardw. C.
Anon. 3 Aik. 726.

27 Feb. 1751, cor. Hardw. C.
Peacock v. Monk, 2 Ves. 190, 191.
Vide Travel v. Travel.
Rich v. Beaumont.

(a) Lord Thurlow said, that the rule laid down in *Peacock and Monk*, that a feme covert, with respect to her separate property, is competent to act as a feme sole, is the proper rule, and necessary to support the decisions on this subject. *Hulme v. Tenant*, 1 Bro. Ch. Ca. 16.

no time was levied or surrender made, but the lord's licence was obtained to aliene without incurring forfeiture. Subsequent to this she made her will, devising the premises to her second husband and his son. And now on ejectment by her heir at law, by *Willes*, C. J. of C. B.—Though I have the strongest inclination in favour of the defendant, this being a court of law, we must determine according to the strict rules of law; but courts of equity can go farther than we can. As to the will, a feme covert cannot make a will. (34 & 35 H. 8. c. 5.) And as to the cases cited, of a power to devise derived from the husband's consent, they were all cases of wills of *personal* property, which differs essentially from *real*; the husband having by marriage the sole property in and power over it*. As to the surrender (a), it was fluctuating and ambulatory, till some further legal act done to complete it (b). The marriage therefore either made it absolutely void or suspended it; in either of which cases its operation is prevented (c). As to the mortgage, it must be bad at all events. There ought to have been either a fine or surrender, so that the feme might be privately examined. On the whole, we are all of opinion for the lessor of the plaintiff. It is certain that the testatrix, being a feme covert, could neither make a will, nor declare the uses of the surrender.

21. A bill brought by a husband and wife for a demand in her right, the husband dies; it is in the nature of a *chose en action*, and survives to her, and the cause does not abate.

22. After the death of husband and wife, her representatives are not to account for money received during the coverture, whether she had a separate estate or not, unless a special case made.

S. C. A wife may dispose of her separate personal estate by any act (a) in her life, or by will, but her real estate descends to her heir, unless properly conveyed, as by a fine if after marriage, if before, by way of trust, or power over use; but not by bare agreement, which can only bar tenancy by the courtsey, unless it is such as would be decreed to be carried into execution.

S. C. If a wife, having an estate to her separate use, borrows money, which she gives her bond for, this would be a sufficient foundation to demand the money against her out of her separate estate, and her declarations may be read in evidence.

23. A

23. A bond given to *A.* in trust, to secure the payment of an annuity of 40*l.* *per annum* during the joint lives of Sir *Edward Smith* and petitioner, who in 1751 married the bankrupt; he delivers up the bond upon his last examination; she applies to the court, and prays the assignees may deliver the bond to her trustee, and that the arrears of the annuity and all future payments may be made to her. Lord Chancellor ordered it accordingly.

S. C. Where a bond is given to a trustee for the benefit of the wife, and the husband becomes bankrupt, the assignees cannot bring an action; for by 1 *Jac.* 1. c. 15. s. 13. assignees can only have the like remedy to recover a debt, as the bankrupt himself might have had the word *party* in the act being meant of the bankrupt.

24. *A.* previous to his marriage with *P.* executed a bond, reciting the intended marriage, and that *P.* was entitled to 800*l.* in lands or houses after the death of her mother, which it was agreed should be settled to the use of her and the children of the marriage, and afterwards to the right heirs of the husband. *P.* was not an executing party, but the marriage was had. The estate fell into possession in the husband's lifetime, and proved to be a real estate. The husband made his will, in which he recited his bond, and devised the inheritance of the estate back to his wife, and all other his real and personal estates, and made her executrix. She proved the will, and married the defendant, and then died. Bill by the two sons of *A.* against the second husband, to have the benefit of the agreement entered into by their father and mother, and to restrain the defendant from proceeding against the estate as tenant by the courtesy. Lord Chancellor thought that informal marriage agreements were binding, and ought to be decreed notwithstanding the statute of frauds upon acquiescence and consequent acts, though not signed by one party. In the present case the wife had shewn her acquiescence under the agreement recited in the condition of *A.*'s bond, and had also submitted to his will (a); she had therefore bound herself to the performance of the agreement, which ought to be carried into execution. Decreed the estate to be equally divided between the plaintiffs.

21 Jan. 1753, cor. Hardw. C.
Ex parte Coffey, 1 *Ark.* 192.

It appeared that the bankrupt's wife brought him a portion of 500*l.* and had nothing to subsist upon but this annuity.

The obiter opinion of Parker, C. J. in *Miles v. Williams & Ux.* 1 P. Wms. 255. that "Cestui que trust being a bankrupt, his assignees may bring an action on a trust bond in their own names, though he must have brought it in the name of his trustee," is denied by Lord Chancellor to be law.

19 July 1754, cor. Hardw. C.
Archer v. Pope, 2 *Ves.* 523.

(a) *Vide* *Noy v. Mordaunt*, 2 *Vern.* 581.

25 Oct. 1755, cor. Hardw. C.
Garsrib v. Bradley, 2 *Ves.* 676.

Note; The distinction taken by Lord Hardwicke in this case seems to be, that where choses en action come to a wife during the coverture, the husband's suing in his own name and recovering is equal to an actual and tangible reduction of them into his possession, as in *Alleyn*, 36. The case in 2 *Lev.* 107. says, the husband ought to bring his action in the name of both; which would give the wife a benefit of survivorship if she outlives her husband; but in other books the husband has an election.

As to such of the wife's choses en action as belonged to her before marriage, it seems the husband can only sue for them in the joint names; and if he does not live to receive the money, the right survives to the wife.

M. 1770, cor. Lds. Comrs.

Salway v. Salway, *Amb.* 692.

1 *Eq. Abr.* 70.

Though this is not strictly a chose en action; it will survive as chattel real. *Ld. Carteret v. Paschall*, 3 *P. Wms.* 197. *Co. Lit.* 351. *Roll. Abr.* 350. l. 5. 1 *Ch. Ca.* 189. *Withers v. Kellies*. *Rudgard v. Nash*. *Packer v. Windham*, referred to *ante*, pl. 5. n. *Cleland v. Cleland*. *Burnet v. Kinnafton*. *Meredith v. Wynn*. *Blois v. Hereford*. *Adams v. Colé*.

P. 1786, cor. M. R.

Pitt v. Jackson, 2 *Bro. Ch. Ca.* 51.

25. A wife's choses en action survive to her, if the husband does not reduce them into possession by suing in his own name.

26. A woman entitled to a rent-charge marries, and had a settlement made upon her; the husband died, and at his death the rent-charge was in arrear. Held, the arrears should go to the wife notwithstanding her settlement, there being no express or implied intention that the husband should be a purchaser of all her fortune.

27. A treaty between husband and wife, relative to the purchase, by the husband, of his wife's separate estate, but not carried into execution during their lives, shall not be executed after the death of the parties; but the husband's personal estate shall be liable for rents and profits received by him, and that estate descending to the children as heirs of their mother, they shall elect as between it and their claims under the father's will.

28. Previous to her marriage a widow entered into an agreement with her intended husband, without seal or stamp, that her property should go to the survivor for life, with power to the wife to dispose by will made after marriage. She being seized of a reversion in fee (subject to an estate-tail, and a trust term for securing annuities, which had determined) made her will, giving all to her intended husband, and married afterwards, on the same day, and in six months afterwards she died. The husband is entitled to an equitable estate for life, under the articles resting in agreement, but the will is revoked by the subsequent marriage not being protected by the power.

29. The husband agreed on marriage to settle stock and other property of the wife, to the use of the wife; but he having by fraud made her transfer the stock to him, without such settlement, upon a bill by the wife for a performance of the agreement. The husband was decreed to transfer the stock, and assign

H. 1789, cor. Thurlow, C.

Hodsdon v. Lloyd,

2 *Bro. Ch. Ca.* 534.

1 *Eq. Ab.* 61. *S. C.* in *Eject-*

ment, reported 2 *Term Rep.* 684.

Vide Taylor v. Raynes, 7 *Mod.* 147.

Forfe v. Hambley, 4 *Co.* 60.

26 Feb. 1780, cor. Buller, J.
 abf. C.

Lampert v. Lampert,

1 *Ves. jur.* 21.

assign the other property, under the direction of the Master, to trustees for the wife's use, who were to receive the dividends for the use of the wife till the transfer and assignment made; and the husband to pay the wife's costs on account of the fraud, and for example's sake.

30. A husband's assignment of his wife's property will not bar her equity upon it.

T. 1793, cor. M.R.

Pope v. Crawford;

4 Br. Ch. Ca. 326.

Vide Wenman v. Mason, 1 P. Wms. 459. n. 5 edit. by Mr. Com.

Sec. 3. Where the Estates, Choses en Action, or Possibilities of the Wife before Marriage shall become charged or reduced into the Possession of the Husband, or survive to him;—where liable to his Debts;—where he shall be considered a Purchaser of her Fortune; and herein of his Power over the Wife's Estate.

1. A Feme possessed of a trust of a term marries, the husband may dispose of it; otherwise, if the term is assigned in trust for the wife, with the privity of the husband.

T. 1681, Dom. Proc.

Sir Edward Turner's Case;

1 Vern. 7. 1 Eq. Abr. 58. pl. 2.

Note; in Pitt and Hunt, Ld.

Nottingham expressed great sur-

prise at this resolution.—*Et vide* Doyly v. Perfull, 1 Ch. Ca. 225.

2. A term assigned in trust for the feme before marriage, without the knowledge of the husband, may be disposed of by him; and this the Lord Chancellor decreed, notwithstanding his surprise at the resolution in Sir Ed. Turner's case, saying, there must not be one sort of equity in the House of Lords, and another in the court of Chancery; and he thought that from henceforth it would not be sufficient to have the husband's consent or privity only to an assignment of a term in trust for the feme before marriage, unless he was also made a party to the assignment.

M. 1681, cor. Nottingham, C.

Pitt v. Hunt, 1 Vern. 18:

1 Eq. Abr. 58. pl. 3.

3. Feme mortgagee in fee of a copyhold estate marries and dies. Lord Keeper would not determine whether the husband as administrator to the wife, or the heir, should have the benefit of the mortgage, there being no covenant to pay the money.

P. 1683, North, C. S.

Turner v. Crane, 1 Vern. 170.

Ld. Keeper did not regard the issue of the feme being admitted by the husband, he thought a covenant for payment of the mortgage money only could give an executor a title to it. His

Lordship would not make any decree, but desired he might be attended with precedents. *Vide* — v. Hicks, 1 Vern. 412. where a forfeited mortgage in fee was decreed to be personal estate, and belong to the

the executor, and not to the heir. *Et vide* Baker and Thornbury, 1 Ch. Rep. 283. where an old forfeited mortgage was decreed to be part of the personal estate, though the money was by the proviso made payable to the heir; and *Noy v. Ellis*, 2 Ch. Rep. 220. where the land was decreed to the executor against the heir, though the mortgagors would not redeem.

P. 1685, Canc.

Blithe's case, 2 Eq. Abr. 85. pl. 2.

2 Freem. 91, 2.

Vide Cotton v. King,

2 P. Wms. 358. 674.

Hunt v. Matthews, 1 Vern. 408.

Howard v. Hooker, 2 Ch. Rep. 81.

Poulson v. Willington,

2 P. Wms. 533.

Thomas v. Williams, Mos. 177.

Lady Strathmore v. Bowes,

2 Bro. Ch. Ca. 345.

P. 1686, cor. Jeffries, C.

Oglander v. Bafon, 1 Vern. 396.

1 Eq. Abr. 69. pl. 7.

Vide Norden v. Levet, cited.

Vide Garforth v. Bradley, ante,
pl. 25. and notes.

P. 1688, Canc.

Randers v. Page, 3 Ch. Rep. 223.

Vide Sir Edward Turner's case,
1 Vern. 7.

4. An assignment by a widow (just before her second marriage, and without the privity of her second husband) of a term of years in trust for herself and her child held good: but a power reserved therein to dispose of the remainder of the said term after the decease of herself and child held void, because such remainder not being disposed of by her before marriage, vested in the husband.

5. A sum of money awarded to the husband, which he is entitled to in right of his wife, and the husband dies before it is paid, will go to his executor, and not survive to the wife, the award being a sort of judgment which has changed the property.

A man may sue alone without his wife for a debt due to her by bond; if he dies, it will go to his executor; but if he joins his wife in the action, and recovers judgment, and dies, the judgment will survive to her.

6. Husband and wife seised in fee in right of the wife, levied a fine to A. and B. &c. to the use of A. and B. for 1000 years, remainder to the use of the wife and her heirs, and declared the trust of the term to be for the husband for life, remainder for the wife and the heirs of her body, with remainders over. After the husband and wife join in a fine *sur concessit* to J. S. for 21 years, rendering 110 l. per annum rent to the husband for life, and then to the wife and her heirs. The wife dies, and then the husband dies intestate. Plaintiff takes out administration to the husband, and defendant to the wife (to whom he was also heir). Plaintiff brought his bill to have this term for 1000 years, for if it had been a term in the wife, the husband would have had it by survivorship, or at least the rent during the residue of the 21 years. Bill dismissed, for though a feme sole *cestuy que trust* of a term shall have the term to her separate use, if she marries without any previous agreement by the husband, yet if the husband after marriage dispose of the term for a valuable consideration, it shall be good in equity, as well as if she had had the term in herself, and married.

7. The

7. The first husband assigns a term for the separate use of his wife; and dies. Her second husband may sell or dispose of it, though he has made no provision for her; and her trustees in this case were decreed to convey the legal estate to a purchaser; for as the husband may dispose of a term for years where the legal estate was in his wife, so he may of the trust of a term, without either the wife or trustees joining.

purchaser ought not to be in a better condition, since he derives under the husband. *Sed non allocatur*—In *Jewson v. Moulson*, 2 Atk. 421. Lord Hardwicke said, there was some dispute at the bar how “non allocatur” at the end of this case is to be applied, whether to the whole case or to the words immediately preceding?—So early as 14 Car. 1. in *Tanfield v. Davenport*, reported by Torhill, it is noticed as a rule in equity, that this court will not suffer the husband to take the wife's portion until he has made a reasonable provision for her—from which it should seem that “non allocatur” is applicable only to the last preceding words.—It seems, however, now settled, that the husband and all claiming under him must make a suitable provision, if he sues for his wife's fortune, though equity will not interrupt the legal title of the husband unless he calls for its assistance.

8. The wife's portion, though out on bond or mortgage, which by law survives to her, shall yet in equity be subject to the husband's bond debts to ease the heir, *where a settlement is made on the wife*, for that makes the husband a purchaser of her fortune, and it shall go to his executors; but if the settlement were only in consideration of part of the fortune, then the remaining part out on bond shall survive to the wife, unless there were an express agreement that the husband should have it.

Note; There was an objection in this case for want of parties, for that the husband's administrator was not a party, but the wife being called administratrix in the bill, and having by answer confessed that she had possessed herself of the personal estate, and disposed of it, (and being the person by law entitled to administration,) though she denied being administratrix, the court overruled the objection.

9. Lord H. upon his marriage with G. agreed to settle 300*l.* per annum in *Suffolk*, and a rent-charge of 500*l.* per annum issuing out of lands in *Worcestershire*, for a jointure. Upon the treaty her fortune was proposed to be 19,000*l.*, 1350*l.* of which was in her grandmother's hands, and by her put out upon mortgage; part of the portion consisting of bad debts, the real portion was estimated at 16,000*l.* Lord H. died. *Quare*, whether this 1350*l.*, being a *chese en action*, should survive to the wife, or go to the executor of the husband? *Per cur.*—It should go to the executor of the husband, because it was under consideration as part of the portion for which the jointure was made; and the jointure was adequate to the portion; and it would be unreasonable the wife should have the jointure and her portion too.

T. 1692, Cane.
Tudor v. Samyns, 2 Vern. 270.
1 Eq. Abr. 58. pl. 4.
Vide Sir Edward Turner's case,
1 Vern. 7.

In the principal case it was objected, that the husband had made no provision for his wife, and if he was plaintiff, the court would not decree the trustees to assign to him without making some settlement on her, and the

M. 1696, cor. Somers, C.
Cleland v. Cleland, Prec. in Ch. 63.
1 Eq. Abr. 70. pl. 14.
Vide Sir Edward Turner's Ca.
1 Vern. 7.
Llister v. Llister, 1 Vern. 68.
Blois & al. v. Lady Hereford,
2 Vern. 501.
Squib v. Wynn, 1 P. Wms. 373.
Duke of Chandos v. Talbot,
2 P. Wms. 608.
Lord Carteret v. Paschall,
3 P. Wms. 199.

Meredith v. Wynn, Prec. in Ch. 312.
Packer v. Wyndham, Prec. in Ch. 412.

P. 1705, cor. Cowper, C. S.
and M. R.
Norben's case, 2 Freem. 282.

T. 1705, cor. Cowper, C. S.
Blais and another, Executors, v. Lady Hereford and another,
 2 Vern. 501—502.
 1 Eq. Abr. 68. pl. 4.
Vide Cleland v. Cleland, Prec. in Ch. 63. Burnett v. Kinaaston, Prec. in Ch. 118. 2 Vern. 401. Rudyard v. Hearn, Prec. in Ch. 209. 2 Freem. 262.
In Salwey v. Salwey, Ambler 672 this is called by Aston, Ld. Commissioner, a strange report.

H. 1708, in Scacc.
Regina v. Thornton, Parker, 271. Vide Hob. 253.
Fawne's Ca. in Cur. Wardor. Cro Jac. 524.

P. 1709, cor. Cowper, C.
Morgell's case,
 2 Eq. Abr. 467. pl. 12.

M. 1709, cor. Cowper, C.
Pale v. Mitchell,
 2 Eq. Abr. 158. pl. 4.
If a feme covert hath a term for years and dies, the lease is the husband's, and he may maintain ejectment, without taking out letters of administration: and then surely he need not in this case, for equity will consider this trust as executed. Ibid.

T. 1710, Canc.
Holland v. Califford, 2 Vern. 652.
It should seem that the trusts of the settlement on this marriage were, as to the rents and

10. On the marriage of two infants, an act of parliament is obtained for settling a jointure in bar of dower, provided that the jointure shall cease if the wife when of age did not settle her land, but nothing was said as to that part of her fortune which was in money, part of which was a mortgage for 1300*l.* taken in a trustee's name. The wife when she came of age settled her own land, and then the husband died. Decreed the mortgage to the executors of the husband, and that it should not survive to the wife as a *chose en action*.

S. C. In all cases where the husband makes a settlement equivalent to the wife's portion, it shall be intended that he was to have the portion.

11. A debt due to a man *jure uxoris*, is considered as a debt originally due to him, within the meaning of the statute 7 Jac. 1. c. 15. and therefore seizable upon an extent.

12. A feme hath a fortune of 400*l.*, to be raised by 40*l.* per annum out of a term of 21 years, to commence *in futuro*; B. married her, and died before the term commenced. The question was, if this *chose en action* when the term commences shall be the husband's assets, and so liable to his debts? Lord Chancellor—If the husband made a settlement upon his wife, it is but reasonable this *chose en action* shall be liable to his debts; but if he hath not, the wife surviving will have it. The Master to inquire if any and what provision the husband made.

13. A term for 99 years, determinable upon three lives, is assigned to A. and B., in trust for C., who married and died. The question was, whether this trust of a term goes to the husband who survived, or to the wife's administrator? Lord Chancellor held clearly, that the trust of a term as well as the term itself survives to the husband, and that he need not take out administration. It appearing that the wife always received the money of the trustees, and the bill being to have the benefit of the trust, and to have an account against the trustees, the payments to the wife were ordered to be allowed in the account, they being by the permission of the husband.

14. A. on his marriage gives bond to leave his wife 500*l.*, or a third of his personal estate, at her election, the wife having had on her marriage a portion of 500*l.* secured by land. A. becomes bankrupt.

bankrupt. Bill by the assignees to have this 500*l.* raised by a sale, and decreed accordingly*; but that the wife should come in as a creditor on her bond, and what shall be paid in respect thereof to be put out at interest, and the interest to be paid to the creditors during the bankrupt's life, and the principal to the wife, if she survived her husband†.

profits of the wife's estate, *int. al.* to the husband for life, or that he was tenant by the curtesy, else why should he be entitled to the interest of the 500*l.* for his life? and the creditors can only stand in the bankrupt's place.

* The assignees in this case filed their bill to have the wife's portion raised and paid by a sale of the land charged. This fore-

ly is contrary to the principle of those cases which bind the husband and those claiming under him to provide for the wife when they sue for her fortune in equity; for here she seems to be wholly unprovided for during the husband's life. *Vide* sec. 9. *post*.

† *Ld. Macclesfield* is said to have doubted of this, *vide* *Ex parte Bayley*, H. 1720; but the point coming in question before Lord King, *Ex parte Caswell*, 2 P. Wms. 497. his lordship ordered the precedents in Lord Cowper's time to be left with him. The case *Ex parte Caswell* was that of a husband's bond to a trustee to secure 1000*l.* to his wife if she survived him. The husband became bankrupt; this debt was not allowed, nor any reservation made for it (a), neither shall it stop the distribution in regard it may never be a debt; but if the contingency happens before a final distribution (b), then such a debt shall be admitted.

15. *R. M.* on a marriage treaty with *B.* agrees, in consideration of 1250*l.* portion, secured to her by bond from her brother to clear his estate, being 70*l.* *per annum*, of present incumbrances, within six months after marriage; and for every 100*l.* he should receive, to settle 10*l.* *per annum* on her for a jointure, and to settle lands on the first and other sons of the marriage. *B.* was not a party to these articles. The marriage took effect, and within the six months *B.* died without issue. *R. M.* on a second marriage with one *P.*, who had a portion of 1600*l.* in trustees hands, agreed to lay out the 1250*l.* to which he was entitled in right of his first wife, together with the 1600*l.* when received, in the purchase of land to be settled on *P.*, for a jointure, and as a provision for the issue of the marriage. The second marriage takes effect, and then *R. M.* dies before he had got in either portion. Decreed the 1250*l.* to the representatives of *R. M.*, and that it should not survive to the administrator of the first wife, he being a purchaser, by his agreement to disencumber his own estate, and being in no default, the wife having died within six months, which prevented the making the settlement.

P. 1711, *cor. Harcourt*, C. S.
Meredith v. Wynn,
Proc. in Ch. 312.
Gillb. Eq. Rep. 170.
1 *Eq. Abr.* 70. pl. 15.
Vide *Packer v. Wyndham*,
Proc. in Ch. 412.
Cleland v. Cleland,
Proc. in Ch. 63.
Burnett v. Kinaffon,
Proc. in Ch. 118.
Blois v. Lady Hereford,
2 *Vern.* 501.
Ld. Carteret v. Paschall,
3 P. Wms. 199.
L. amoy v. Duke of Athol,
2 *Atk.* 448.
Howman v. Corie, 2 *Vern.* 190.
Bond v. Simonds, 3 *Atk.* 20.

(a) *Vide* *Tully v. Sparkes*, *Ld. Raym.* 1546. *Ex parte Jeffries*, 4 *Vin.* 72. pl. 7. *Ex parte King*, *Dav.* 254. *Hantock v. Entwistle*, 3 *Term Rep.* 435. — *Secus*, where the provision is secured by a judgment (1) or a bond forfeited at law before the bankruptcy. *Ex parte Groome*, 1 *Atk.* 115. *Ex parte Winchester*, 1 *Atk.* 116. *Ex parte Mitchell*, 1 *Atk.* 120. *Ex parte Greenaway*, 1 *Atk.* 113. *Goddard v. Vanderheyden*, 3 *Willf.* 271. — Where the contingency upon which the money is payable is the bankruptcy or insolvency of the debtor, such debt cannot be proved under his commission. *Ex parte Hill*, *Cooke's Bankrupt Laws*, 282.

(b) *Sed contra*, *Ex parte Groome*, 1 *Atk.* 118.

(1) A judgment at law with a defeasance is not a contingent debt. 1 *Atk.* 117.

M. 1715, cor. Cowper, C.

Packer v. Wyndham,

Prec. in Ch. 418.

Gilb. Eq. Rep. 98.

2 *Eq. Abr.* 138. pl. 5. 6.

See this case fully stated, *post*,
sec. 9.

The difference between a bond and a term of years is, that the bond is a chose en action not assignable at law, and a term for years is a chattel real, which the husband may assign without his wife, as also the trust of such term, and consequently the money secured by it. *Vide* Grey v. Kentish, 1 Atk. 280. Bates v. Dandy, 2 Atk. 203. *Gilb. Ch.* 277. *Vide* also Squib v. Wynn, 1 P. Wms. 378. Bosvil v. Brander, 1 P. Wms. 458. Cleland v. Cleland, *Prec. in Ch.* 63. Blois v. Lady Hereford, 2 Vern. 501. Meredith v. Wynn, *Prec. in Ch.* 312. Ca. temp. Taib. 168.

(a) Burnett v. Kinafton, 2 Vern. 201.

M. 1717, cor. Cowper, C.

Squib v. Wynn,

2 *Eq. Abr.* 423. pl. 6.

1 P. Wms. 378.

(a) Though a husband administering to the wife is liable to pay her debts, yet he is entitled to the surplus, which will go to his representatives. *Vide* Earl of Thomond v. Earl of Suffolk, 1 P. Wms. 468. Heard v. Stamford, 3 P. Wms. 409.

(b) Reg. Lib. B. 1717, fo. 195. It appears by the Master's report in this cause, that F. took out administration to his wife, and some time after her death he assigned all his interest in his late wife's share of B.'s personal estate to G. in consideration of 350*l.*, of which 124*l.* was actually paid by G. to F. F.'s second wife having administered (as stated), impeached the assignment to G. for fraud, and after some time they agreed that G. should waive all benefit of the assignment on being repaid the 124*l.*, which being done, the assignment was delivered up. — Lord Chancellor thought that as the spiritual court had granted administration de bonis non of B. to F.'s second wife, she had a right to one-third of B.'s personal estate; and directed the same to be divided accordingly. — Lord Chancellor also thought that the assignment, though voluntary, did bind the property; for although the assignment from F. to G. might be void as between them, it would be sufficient to alter the property as between the husband and wife.

(c) An order of the court for payment of a wife's legacy to a husband in her right vests it in the husband, though he die before payment; and the wife is defeated of her right by survivorship. — Heygate v. Annelley,

16. A feme (who was a lunatic) being entrapped into a marriage, and no settlement being made on her, though she had a large fortune, the court committed the husband, and ordered all her property to be lodged in the hands of a Master as a security in case the wife should survive, or there should be issue of the marriage. Among this property there were two mortgages for years, one of which being paid off during the coverture, held, the property vested absolutely in the husband by law, and should go to his representatives, though placed under the control of the court by way of caution. Held also in this case, that a husband may assign a term or mortgage for years, which he has *jure uxoris*, as he may likewise the trust of such term; and this shall prevail against the wife if she survives, but the husband cannot alone assign the wife's mortgage in fee (a), nor her bond debt, which is her *chose en action*.

17. A. had four daughters, B., C., D., and E.; and, after having given some legacies, devised his real and personal estate among his said daughters equally, and died. E. married F., and afterwards B. died *intestate*. F. assigned over all his wife's share of B.'s estate (consisting of *chose en action*) to G., and then E. his wife died (a). F. married again, and died *intestate*: his second wife took out administration to him, and also to E. *de bonis non* administered by F. The question was, who was entitled to E.'s share of B.'s estate, the assignment being without a valuable consideration, and only in trust, and F. the husband not having taken out administration? Lord Chancellor thought the property bound (b) by the assignment, though voluntary, because of the delays that might be used before he could recover in equity (c), which ought not to prejudice him: and that the exception in the *stat. 29 Car. 2. c. 3. s. 25.* does not confine it to the life of the husband, or to the circumstance of his having reduced any part of the wife's personal estate into possession, but provides that no part of her estate shall be distributed among her relations after her. And decreed E.'s share of B.'s personal estate to the administrator of F.

(a) F. had a right to one-third of B.'s personal estate; and directed the same to be divided accordingly. — Lord Chancellor also thought that the assignment, though voluntary, did bind the property; for although the assignment from F. to G. might be void as between them, it would be sufficient to alter the property as between the husband and wife.

(c) An order of the court for payment of a wife's legacy to a husband in her right vests it in the husband, though he die before payment; and the wife is defeated of her right by survivorship. — Heygate v. Annelley,

v. Annesley, 3 Bro. Ch. Rep. 362. — In this case was cited *Cart v. Rees*, (27 Nov. 1718,) where a wife died possessed of choses en action, and the husband survived, and died without taking out administration to her, upon which the wife's next of kin administered. Held per Ld. Parker, that the wife's administrator was only a trustee for the executor of the husband, the right to the wife's choses en action being vested in the husband as her next of kin by the statute of distributions (1); and his lordship said, that the proviso in 29 Car. 2. c. 3. §. 25. was made in favour of the husband, and not to his prejudice. — It now seems settled, that although a husband may assign his wife's choses en action, yet it must be for a valuable consideration, and that beyond the consideration such assignment will not bind the wife surviving. *Vide Bates v. Dandy*, 2 Atk. 207. *Jewson v. Moulson*, 2 Atk. 417. *Saddington v. Kinsman*, 1 Bro. Ch. Ca. 44. As to the equity to which such property is subject in the hands of an assignee, *vide Jacobson v. Williams*, 1 P. Wms. 382.

(1) On this point was cited *Lady Aiscough's case*, wherein Ld. Cowper's opinion accorded with Ld. Parker's, that the wife's choses en action did vest in the husband by the statute of distributions: so that since this resolution the right of administration follows (or includes) the right to the estate, and ought in case of a surviving husband's death to be granted to his next of kin, in the same manner as it is granted to a residuary legatee. *Vide Bacon v. Bryant*, 11 Vin. Abr. 88. pl. 25. *Humphreys v. Bullen*, 11 Vin. Abr. 88. pl. 26. *Elliot v. Collier*, 3 Atk. 526. 1 Ves. 15. 1 Will. 168. *Bouchier v. Taylor*, Harg. Law Tracts, 473. 7 Bro. P. C. 414.

18. A feme sole mortgagee in fee marries; the husband becomes bankrupt, and dies; the assignees and not the wife are entitled to the mortgage. *Secus*, if by articles before marriage this should continue to the wife.

which may be added, as to a particular assignment by the husband of a wife's choses en action, for a valuable consideration, or as to the distinction between such an assignment and the assignment of a trust term. Like *v. Beresford*, 3 Ves. jun. 506. *Burdon v. Dean*, 2 Ves. jun. 607. *Oswell v. Probert*, 2 Ves. jun. 680. *Browne v. Clarke*, 3 Ves. jun. 166. *Freeman v. Parsley*, 3 Ves. jun. 421.

T. 1718, cor. M. R.

Boswell v. Brander,

1 P. Wms. 458. 461.

1 Eq. Abr. 113. pl. 3. 4.

See a long and special note to this case, *ante*, tit. Bankrupt, f. 8. pl. 13. *et post*, f. 9.; to

19. A woman being entitled to a portion of 4000 l. after the death of her mother, and no interest being payable for it in the meantime, and she having married a considerable tradesman, it was decreed by the wife's consent, that the husband might sell or dispose of a moiety of the portion as he thought fit.

T. 1718, cor. Cowper, C.
Butler v. Duncomb, 2 Vern. 762.
1 P. Wms. 448. and 1 Eq. Abr. 339. pl. 6. S. C.; but nothing is there said (except by note) of Mr. Butler's application for half of his wife's portion, nor of the wife's consent that he should have it.

20. The husband being possessed of a term in right of his wife, was divorced *à mensa et thoro*, and she had alimony allowed her, but he being about to sell his term, an injunction was granted to restrain him, upon the application of the wife.

Fitzer v. Fitzer, 2 Atk. 514. *Dimmock v. Atkinson*, 3 Bro. Ch. Ca. 105., but afterwards granted it; for though the marriage continued, yet the husband did nothing as husband, nor the wife as wife. *Vide Co. Litt.* 46. 351. *Hob. 3.* in marg. 1 Vent. 7. 18. 2 Ca. in Ch. 73. 2 Vern. 270. 3 Atk. 435. 3 Will. 277.

T. 1723, Cane.

Anon. 9 Mod. 43.

2 Eq. Abr. 158. pl. 2.

Note; The court at first denied the injunction because the divorce *à mensa et thoro* did not destroy the marriage. *Vide Milner and Colmer*, 2 P. Wms. 641.

21. A long term of years being vested in the husband in right of his wife, he made an underlease for 10 years; and upon borrowing money of the lessee, covenanted to grant him another lease, to commence after the end of the 10 years, and to continue during the time he had any right, but died before he made such lease. Decreed a good disposition of the term in equity, and that the co-

T. 1723, cor. M. R.
Steed v. Cragh, 9 Mod. 42.
2 Eq. Abr. 37. pl. 3. S. C.
Vide Anon. Poph. 4. *Grute v. Locofost*, Cro. Eliz. 237. *Harbon v. Barton*, Mo. 395. *Norden v. Lovett*, 1 Freem. 442. 1 Eq. Abr. 240. 2 Jon. 88. 2 Lev. 189. *Oglander v. Baffon*, 1 Ven. n. 396. 1 Eq. Ab. 69.

Note; It was not prayed in the

bill that the defendant, the husband's widow, should be obliged to carry this covenant into execution, but that the court would declare it to be a good disposition of the term in equity, and thereupon grant an injunction against the defendant, who had brought an ejectment. — Note also, that the widow did not claim either as executrix or administratrix, but by virtue of that right which she had paramount to that of her husband; and therefore demurred to the bill, suggesting that if there were any such covenant it was only a bare agreement between the parties, and rested in covenant which could only charge the executors or administrators of the covenantor, and that the bill might be dismissed with costs—but decreed as above.

H. 1724, in Scacc.
Hodges v. Brewerley and another,
Runb. 188.

M. 1729, cor. M. R.
Nightingale v. Lockman & Ux.
Mof. 231. Fitzgib. 148.
Vide Parker v. Windham, Prec.
in Ch. 412. cited in this case.
Vide Oglander v. Bafton,
1 Vern. 396.

T. 1731, cor. King. C.
Duke of Chandos v. Talbot,
1 P. Wms. 608.
2 *Eq. Abr.* 89. pl. 13.
253. pl. 12.
Vide Jacobson v. Williams,
1 P. Wms. 385.
Higden v. Williamson,
3 P. Wms. 132.
Theobald v. Duffey, 9 Mod. 101.
Beckley v. Newland,
2 P. Wms. 182.

T. 1733, cor. King. C.
Lord Carteret v. Paschal,
3 P. Wms. 199.
2 *Eq. Abr.* 89. pl. 15, 16.
This decree was affirmed in the
Lords, 4 Bro. P. C. 168. 4 Vin.
Abr. 57. pl. 20. 2 *Eq. Abr.* 133.
pl. 5.

Note; It is to be observed, that in all cases where a husband makes a settlement of his own estate on his wife in consideration of her fortune, her portion, though consisting of choses en action, and though there be no particular agreement for that purpose, is looked upon as purchased by him, and shall go to his executors.

4 *Vide Cleland and Cleland*,
Prec. in Ch. 63.
Elvis and another v. Lady Hereford, 2 Vern. 501.
Packer v. Windham,
Prec. in Ch. 412.
1 Roll. Abr. 358.

venant was such a lien as bound the right in any other hands.

22. A note given to the wife in the husband's lifetime for money, shall be taken as part of the husband's assets.

23. The portion of a lunatic, by order of court, is paid in to a Master, and the husband, on making a settlement, is to have it out: he makes no settlement, but assigns the money over to his creditors, and dies without issue; the wife survives, and dies; the money was decreed to the creditors of the husband, for the payment to the Master was a payment to the husband, though the court would not let him lay his hands on the money, without making a provision for the wife; but she being dead without issue, his right is the same in equity as at law.

24. A *chose en action* though not assignable at law, yet is so in equity, where the husband may assign it alone, as he may any other part of the wife's personal estate; so may a contingent interest which the husband has in right of his wife, or a possibility of a term, which though not good strictly by way of assignment, yet will operate as an agreement where for a valuable consideration.

25. A man possessed of a *chose en action* in his own right may assign it, though without any consideration; but a baron possessed of a *chose en action* in right of his wife cannot assign it unless for a valuable consideration, and yet he may release it.

S. C. If the wife have a judgment, and it is extended upon an *elegit*, the husband may assign it without a consideration; so if a judgment be given in trust for a feme sole who marries, and by consent of her trustees is in possession of the land extended,

tended, the husband may assign over the extended interest: and by the same reason, if the feme has a decree to hold and enjoy lands until a debt due to her is paid, and she is in possession of the land under this decree, and marries, the husband may assign it without any consideration, for it is in nature of an extent.

26. The husband upon his marriage with *A.*, in consideration of her fortune, computed at about 500 l., gave a bond to trustees to pay her 10 l. per annum, to her separate use, and that she might dispose of 100 l. by will in his lifetime, and if she survived him, he was to leave her 200 l., and all her wearing apparel, plate, &c. Part of the wife's fortune was a bond of 200 l. The husband died, (the bond being unpaid,) but before his death he made his will, and thereof appointed *C.* his residuary legatee. Then the wife dies. Decreed, this bond shall go to the representative of the husband, *he being a purchaser of it by the settlement made on his wife.*

estate by the husband on his wife, only a provision that in case she should survive him, then he should leave her 200 l. &c. though here is nothing moving from the husband, since the whole that the wife is to have will not amount to 500 l. yet this is still the agreement of the parties. Had there been no agreement, the law, which gives her the chance of survivorship, must have taken place; but she has waived that chance by her express agreement of having so much at all events, and the husband's departure from that absolute right which the law gave him over the whole, either by reducing into possession or releasing this debt, is of itself a sufficient consideration; the consequence of the husband's not having this 200 l. would be, that he would be bound to leave her so much if she survived him, and she not bound at all.

(a) *Vide Harvey v. Astley*, 3 Atk. 612.

27. *A.* survives her first husband, who left her a legacy; she dies, the legacy being unreceived by the second husband during her life; after her death he administers, and dies before the legacy comes to his hands; his administrator gets it in, and the administrator *de bonis non* of the wife brings his bill for the legacy. A court of equity considers the administrator *de bonis non* as a trustee for the administrator of the husband, who having an absolute right by surviving his wife (a), his administrator ought to have the benefit of it.

During the coverture, husband and wife are but one person; but when the dies, he has a right to administer exclusive of all other persons.

(a) Notwithstanding by the rules of law the administrator of the wife is entitled to the legacy as a chose en action not got in by the husband during his life, yet equity will consider her administrator as a trustee for the administrator of the husband, who by surviving obtained a vested interest: besides the husband is not within the equity of the statute of distributions, and it is also explained by the last clause of the statute of frauds, sec. 25. which declares that nothing in that act should extend to the estates of feme coverts that die intestate, but that their husbands may demand administration, and enjoy their

Sir Edw. Turner's case, 1 Vern. 7.
Tudor v. Samyne, 2 Vern. 270.
Squib v. Wynn, 1 P. Wms. 378.
Burnett v. Kinafton, 2 Vern. 401.
Jones v. Earl of Strafford,
3 P. Wms. 87.
Vide Notes to Jewson and
Moulson, post, sec. 2. & sec. 9.

H. 1735, cor. Talb. C.

Adams v. Cole,

Ca. temp. Talb. 168.

2 Eq. Abr. 143. pl. 15.

Note; Most of the cases where choses en action have been decreed to the husband's representatives (he dying in the lifetime of the wife) have gone upon the reason of equality (a), there being a settlement made by the husband on his wife, whereby he became a purchaser of her fortune; and therefore, as she was to have the provision made by the settlement, he ought to have her whole portion. In the principal case indeed there is no settlement of any

18 May 1737, cor. Hardw. C.

*Humphrey, Administrator, v. Bul-
len & Ux. Administratrix, &c.*

1 Atk. 458.

2 Eq. Abr. 425. pl. 21.

11 Vin. Abr. 38. pl. 26.

Vide Cart v. Rees, cited 1 P.
Wms. 381. S. P.

Note; At common law no person had a right to administer, but the ordinary could grant administration to whom he pleased till 21 H. 3. which gave the right to the next of kin; and where there were several of equal kindred, whoever took out administration was entitled to the surplus; wherefore the statute of distributions was made to compel

the administrator to distribute and prevent such injustice.

their personal estates *. Lord Chancellor thought the bill filed in the principal case a breach of trust, and dismissed it with costs. — For the plaintiff was cited *Burnett v. Kinafton*, Prec. in Ch. 118. and 2 Vern. 401. and for defendant *Huntley v. Griffith*, Mo. 452.

* Upon this subject *vide* *Watt v. Watt*, 3 Vef. jun. 244.

24 June 1740, cor. Hardw. C.

Sys. v. Price, 9 Mod. 217.

Barnard. 117.

Vide 2 Vern. 63. 507. 683.

La Noy v. Duchels of Athol,

Adams v. Cole, 9 Geo. 2. in
Forrester's Rep.

Vide Co. Litt. 37. b.

28. *A.* devises his lands to trustees for payment of debts and legacies, and after to *B.* in tail male. *B.* suffers a recovery, and enters into a treaty of marriage with *C.* an infant, a legatee of 3000*l.*; and also of a bond for 200*l.* charged on the said estate; on which *B.* covenants with trustees by articles, that in consideration of the intended marriage, and of the portion of 3000*l.*, and bond of 200*l.*, to settle a jointure upon *C.* of one-third of the devised estate, which was about 300*l.* per annum, in bar of dower. The marriage took effect, and the wife survived, yet her *choses en action* being the consideration of the settlement, shall not survive in equity: and this is a good settlement according to 27 *Hen. 8. cap. 10.* to bar the wife of her dower. But if, in consideration of the wife's fortune, which consisted of *choses en action*, a husband settles an estate inadequate to such fortune and the degree of the wife, a court of equity will not take away that right which the law gives the wife to *choses en action*.

S. C. A *chose en action* of the wife's before marriage, charged upon the husband's estate, shall not, after the death of the husband, survive; but shall be considered as merged.

29 April 1741, cor. Hardw. C.
Grosvenor v. Lane, 2 Atk. 180.

29. *P.* gives a third of a moiety of the residue of his personal estate to his daughter *S. P.*, who marries, and, whilst out of the kingdom, assigned (together with her husband) this third of a moiety which was to arise out of *P.*'s estate, in trust for their daughter, provided they died before they came to *England*. *S. P.*'s first husband died, and before the money was reduced into possession she married a second, who survived her. *If she had continued a widow, she would have been entitled to a decree for this third, and no notice would have been taken of the daughter's interest.*

26 July 1741, cor. Hardw. C.
Bates v. Dandy, 2 Atk. 208.

30. If a bond be given to a *feme sole*, who marries afterwards, the husband and wife must join in the action; otherwise, if made to the wife after marriage, the husband alone may bring the action and recover.

S. C. A husband may assign the trust of a wife's term, unless it be a trust from himself for the wife's

wife's benefit; so likewise he may dispose of her mortgage in fee, as well as her mortgage for a term.

S. C. A husband may assign a wife's possibility, if it be for a valuable consideration, and he may release her bond without receiving any part of the money.

31. *J. B.* by his will directs his whole estate to be turned into money, and gives it to his executors in trust for the benefit of his four sons and his daughter, to be divided equally between them, and if either die before twenty-one, his or her share to go to the survivor. *H. B.* one of the sons died under age, and his share went over to the survivors. In 1739 one *V.* a trader married the daughter, but made no provision for her, and being indebted to the defendant, gave him a bond, and assigned over all the share which in his wife's right he was entitled to in her father's personal estate, and afterwards a second assignment for the benefit of his creditors in general. His wife during these transactions was under age: the executors of the father had made no division of his personal estate. *V.* became a bankrupt, and his wife had two children to maintain: her share under the will amounted to about 600 *l.*, and the defendant the creditor's debt to 500 *l.* Lord *Hardwicke* was of opinion not to allow the creditor of the husband to receive the fortune of his wife without making some provision for her; and recommended it to the creditor to give her and her children some part of the principal of her fortune.

27 Oct 1742, cor. *Hardw. C.*
Jewson v. Moulson, 2 *Atk.* 417
Vide S. C. post, sec. 9, and special notes.

His lordship afterwards decreed, in consequence of an agreement between the parties, that a moiety of the fortune of the wife should be placed out for her separate use during her life, and after her death to be paid to her children in equal shares.

6 Dec. 1742.

S. C. As a father would not have married his daughter without insisting upon some provision; neither will the court of Chancery, who stand in *loco parentis*, do it.

S. C. Where the ecclesiastical court have given their consent that the husband should have the wife's portion, this court has granted an injunction to stay the proceedings there.

Vide Anon. cited in *Nicholas v. Nicholas*, *Precedent in Ch.* 548.
Anon. 1 *Eq. Abr.* 64. pl. 1.
Toth. 114. *Winch v. Page*,
Bunb. 86. *Gardiner v. Walker*,
1 *Str.* 503. *Hamilton v. Buckle*,
1 *Str.* 238.

S. C. Where there is a bond debt to the wife *dum sola*, and the husband recovers it at law, there is no instance of this court's granting an injunction, for the suit was proper at law.

S. C.

Vide Burnett v. Kinafton,
2 Vern. 401.
Taylor v. Wheeler, 2 Vern. 564.
Jacobson v. Williams,
1 P. Wms. 382.

Vide Tudor v. Samyne,
2 Vern. 270.
Walters v. Saunders,
1 Eq. Abr. 58.
Bosvil v. Brander, 1 P. Wms. 458.
Bates v. Dandy, 2 Atk. 207.

Vide Sir Edw. Turner's case,
1 Vern. 7. but in Pitt v. Hunt,
1 Vern. 18. Lord Nottingham
expressed great surprise at this
resolution, yet he made the same decree.

S. C. Where a husband makes a voluntary assignment of the wife's portion, the volunteer stands in his place only, and there is the same equity in regard to executors and administrators, and the same as to assignees of bankrupts, for it is the law that casts it upon them.

S. C. It is now very well known that a possibility may be both assigned and released, notwithstanding Lord Cowper's doubts in *Jacobson v. Williams*.

S. C. Where the husband assigns the wife's trust of a term for a valuable consideration, the assignee need not make a provision for the wife before he is entitled.

S. C. As at law the husband could dispose of a term for years, so he may dispose of the trust of a term.

S. C. In the principal case the husband had assigned the whole of the wife's portion, which he could not get at without the assistance of the court, and upon this point Lord Hardwicke laid great stress; for if such practice were allowed, it would defeat all the care of the court with regard to infants; wherefore on the 6th of December 1742 his lordship decreed as before stated.

13 Nov. 1742, cor. Hardw. C.
Eaney v. Duke and Duchess of
Arbol, 2 Atk. 448.

32. The wife's portion has in some cases been decreed to the husband, though he has not made a settlement adequate to it, when the settlement was before marriage; otherwise, on a voluntary settlement after marriage,

21 June 1743, cor. Hardw. C.
Eand v. Simmonds, 3 Atk. 20.

33. A legacy of 500 *l.* was given by *A.* to *B.* before her intermarriage with the plaintiff, who though he had received 2000 *l.* with his wife, refused to make any provision for her; whereupon the executor of *A.* would not pay the legacy; and in 1734 the husband bringing his bill for it, the court ordered him to lay proposals for a settlement before a Master, which he also neglected to do, and on the Master's certificate the court decreed the legacy to be laid out in the funds, subject to the further directions of the court. The husband died, and at the time of his death the dividends amounted to 122 *l.*, which his executor claimed as the *chose en action* of the wife, reduced into the husband's possession by the decree of investiture. The Master of the Rolls thought the wife was entitled to the principal, and the executor of the husband

band to the dividends; but Lord Chancellor on appeal said, that if the husband had recovered a judgment, and died before execution, the wife and not the husband's executor would have been entitled; and decreed for the wife.

34. A husband may dispose of a possibility in equity, if assigned for a valuable consideration; but it must be an assignment of that particular thing, and not rest only on intention and construction of words in a covenant.

7 May 1743, cor. Hardw. C.
Hawkins v. Obyn, 2 *Atk.* 549.

35. Previous to the marriage of *G. S.*, the father of the intended wife covenants to pay 1000 *l.* to the husband on the marriage, and that his heirs, executors, &c. should pay likewise to the husband, his executors, &c. six months after the father's death, 500 *l.* as the remainder of the wife's portion; and by the same deed, the husband contracted he would give security by specialty, that in case his wife survived him, his heirs, &c. should, within six months after his death, pay her 1000 *l.* He gave a bond three days after the marriage, and then becomes a bankrupt; but before the bankruptcy, and after the father-in-law's death, the husband being indebted to the plaintiff, assigns the 500 *l.* to him as a security for the debt. Upon a bill by the assignees of the 500 *l.* against the executrix of the wife's father, and the bankrupt and his wife, and the assignee under the commission for this 500 *l.*, Lord Chancellor directed the executrix of the wife's father to account for the 500 *l.* to the plaintiff, as it never was the money of the wife, but a debt due to the husband himself.

3 Feb. 1746, cor. Hardw. C.
Brett v. Forcer and others,
3 *Atk.* 403.

It was contended by the defendant's counsel, that the court could not interfere in this case; but Lord Hardwicke thought otherwise; for if he were to stand neuter, the assignees under the commission, who would have the legal interest, would run away with it, and they have less equity than the plaintiff.

S. C. Where the wife has a demand in her own right, and the husband applies in her right, if there be no agreement before marriage on her behalf, the court will take care of her interest; but in this case the father covenanted with the husband, and the money never was the property of the wife, but of her husband.

S. C. If the husband had not been a bankrupt, and had brought a bill for performance of the father's covenants under the articles, the court could not have compelled him to do more than give a bond, and the wife must have taken her chance as to her share of the husband's personal estate, and his assignees shall not be in a worse condition than himself.

Per Lord Hardwicke—There are many cases where an assignee for a valuable consideration has been held to be in a better condition than the assignor, but none where he has been held to be in a worse.

9 Feb. 1746, cor. Hardw. C.
White v. Sanfum, 3 Atk. 410, 412.

36. N. the mother of A. S. was seised in tail *ex provisione viri* of the estate in question, reversion in fee to W. S., the husband of A. S., who was dead. A. S. and her husband W. S. in his life-time created a mortgage term of 1000 years on this estate, and N. joined in levying a fine to the mortgagee, remainder to such uses as W. S. should appoint, and in default thereof to him and his heirs. W. S., before the levying of the fine on sale of an estate belonging to him, covenants with J. S. the purchaser for a quiet enjoyment, and afterwards makes an appointment to trustees for particular purposes of the wife's estate, 1st, by sale of his wife's estate to raise money and pay the mortgage, and the residue for the benefit of his wife and children. J. S. being evicted of the lands he purchased, and N. and W. S. being dead, brings his bill against A. S. the widow and her four children, to subject her estate to the plaintiff's demand under the covenant of W. S. *It being a doubtful case whether the plaintiff's debt accrued by breach of covenant, till after the appointment of W. S. in execution of the power, Lord Hardwicke dismissed the bill.*

The trust created by the husband of the wife's estate would not at law have been deemed fraudulent against creditors, nor even against a subsequent purchaser; and if so, this court will not carry it further.

Voluntary conveyances in general are held fraudulent against purchasers.

1 July 1747, cor. Hardw. C.
Elliot v. Collier, 3 Atk. 526, 527.

Vide Humphreys v. Buller,
 1 Atk. 458.

37. Where a husband dies before he administers to his wife's personal estate, it shall not go to her next of kin, but to his representative.

S. C. Though the ecclesiastical court are bound, by act of parliament, to grant administration to the next of kin of the wife, yet that does not bind the right in the court of Chancery; for the husband surviving the wife, her whole estate vested in him at the time of her death, and the whole property belonged to him.

Had the wife survived the husband, such part only of her father's personal estate *as had continued choses en action* would have survived to her, for *whatever he had reduced into possession* would have been the husband's.

S. C. Upon the equity of the statute of distribution this court makes an administrator *de bonis non*

non only a trustee for the next of kin, with respect to such part of the personal estate as is undisposed of.

38. It has been frequently determined that a husband may assign a wife's choses en action, and that turns upon the husband's right to sell.

6 July 1747, cor. Hardw. C. *Bush v. Dalway*, 3 Att. 533. Vide *Theobald v. Duffey*, Dom. Proc. Mar. 1730, wherein it was determined, that a possibility of a wife's term was assignable for a good consideration.

39. Husband on his wife's death becomes entitled to her choses en action; the court will not compel him to make a settlement on the children, for it might prejudice creditors. The relief is personal to the wife.

8 July 1765, cor. Northampton, C. *Serice v. Tapley*, Amb. 509.

40. The question in this case was, what interests of the wife so vest in the husband as to become the property of the assignees upon his bankruptcy? The cause stood over for the Lord Chancellor to form his opinion, and in the mean time the parties compromised.

P. 1779, cor. Thurlow, C. *Sodington and another, Assignees, v. Kinsman and another, Assignees*, 1 Bro. Ch. Ca. 44.

case was cited one in MS. *Gayer v. Wilkinson*, 15 Nov. 1773, which (so far as relates to the present subject) was as follows. A. bequeathed 2000*l.* South-Sea stock to B., in trust to pay the dividends to his nephew C. for life, and after his decease to divide the principal amongst D., E., F., and G. (children of C.) to be transferred to them after the death of C., as they should attain twenty-one or marry (with benefit of survivorship in the mean time). E. married H., who became a bankrupt in the lifetime of her father; then the father died and then the bankrupt died. The question was, whether the bankrupt's assignees were entitled to any and what part of the stock? The assignees insisted that the statutes of bankruptcy had vested the husband's right in them as effectually as if it had been reduced into his possession; but Lord C. dismissed the bill. At the hearing of the principal case Lord Thurlow asked the counsel if they knew of any that in point contradicts *Gayer v. Wilkinson*, for that he did not; and whether it was considered as the law of the court, that if the husband should assign the wife's choses en action without consideration it would bind the wife? His lordship said, that in case of an assignment for a valuable consideration no provision is made for the wife. *Squib and Wyn*, 1 P. Wms. 378, and *Shepherd v. Shepherd*, 1 Bro. Ch. Ca. 51. (n.) were cited as instances of voluntary assignments, where a bill being brought to charge the estate, the court made a decree; to which his lordship said, that a voluntary assignment of a real estate undoubtedly binds. See *Worral v. Marlar* and *Bushnan v. Pell*, in Mr. Cox's notes to *Bosvil v. Brander*, 1 P. Wms. 458.

Although this case was not decided, the learned arguments on both sides of the question render it worthy of attention.—In this

41. Money of the wife is by settlement to be lent to the husband, on bond, at 4 per cent, but no interest to be taken till he should decline trade, then the interest to be paid to him for life, remainder to the wife for life, remainder to the children. The husband becomes a bankrupt; the assignees are entitled to the interest during his life.

H. 1789, cor. Thurlow, C. *Stratton v. Hale*, 2 Bro. Ch. Ca. 490. Vide *Osman v. Smith*, MS. case cited.

Lockyer v. Savage, 2 Stra. 947. Ex parte Brown, 14 Mar. 1788. Ld. Chancellor said, the wife and children can have no claim until the death of the husband, though it is *debitum in presenti* it

is *solvendum in futuro*, therefore they come in the class of creditors under 7 G. 2.

42. Money having been ordered to be paid to the husband in right of his wife, and he died before payment. Held a vested interest in him, and to be paid to his executor.

T. 1791, cor. Thurlow, C. *Heygate v. Annisley*, 3 Bro. Ch. Ca. 362.

43. By marriage the husband clearly acquires an absolute property in all the personal estate of his

10 July 1797, cor. M. R. *Largham v. Nemy*, 3 Ves. jun. 467.

his wife, capable of immediate and tangible possession; but if it is such as can be reduced into possession by action only, either at law or in equity, he has only a qualified interest, such as will enable him to make it absolute by reducing it into possession; but if he does not do so as a *chose en action*, it will survive to the wife.

8 Aug. 1797, cor. M. R.
Like v. Beresford, 3 Vef. jun. 506.
Vide Bosville v. Brander, 1 P. Wms. 459. where all the cases upon the subject, except some since decided, are comprised in Mr. Cox's note. Since which, *vide Prior v. Hill*, 4 Bro. Ch. Ca. 139., where the husband made a *general* assignment to creditors, and was held bound to provide for the wife. As to a *particular* assignment by the husband for a valuable consideration, *vide Burdon v. Dean*, 3 Vef. jun. 607. *Oswell v. Probert*, 2 Vef. jun. 680. *Brown v. Clarke*, 3 Vef. jun. 166. *Freeman v. Parsley*, 3 Vef. jun. 421.

44. Settlement of the property of a married woman, a ward of the court, and of all the dividends and interest accrued, directed in opposition to an assignment by the husband for valuable consideration.

37 Feb. 1798, cor. Loughb. C.
Pringle v. Hodgson,
 3 Vef. jun. 617.
 All the cases on this subject were reviewed by Lord Thurlow.
Vide Worrall v. Matlar, in Mr. Cox's note to *Bosville* and *Brander*, 1 P. Wms. 459.

As to a *particular* assignment by the husband for a valuable consideration, *vide Like v. Beresford*, 3 Vef. jun. 506.—*Vide* also *Burdon v. Dean*, 2 Vef. jun. 607. *Oswell v. Probert*, 2 Vef. jun. 680. *Brown v. Clarke*, 3 Vef. jun. 166. *Freeman v. Parsley*, 3 Vef. jun. 421. *Pryor v. Hill*, 4 Bro. Ch. Ca. 139. *Vide* note to *Jewson and Moulson*, *post*, sec. 9.

45. A settlement made after marriage, of stock standing in the name of the wife before and at the time of the marriage, as her fortune. The husband being insolvent at the time, and soon after becoming a bankrupt, the same was set aside as fraudulent against creditors, upon a bill by the assignees after the death of the husband. The stock did not survive, but decreed to the assignees, subject to a provision out of it to the widow.

S. C. Assignees of a bankrupt may recover, in an action against the Bank, stock standing in the name of the wife.

Sec. 4. Of the Acquisitions of the Wife during Coverture, under her Marriage Agreement, or otherwise:—where they shall be preserved for her Benefit or survive to her, and where go to her Husband:—And in what Cases she shall be considered a Feme Sole as to her separate Estate during Cohabitation, and dispose thereof accordingly.

M. 1682, cor. North, C. S.
Fauke v. Lewin, 1 Vern. 88.
 1 Eq. Abr. 69. pl. 8. 156. pl. 10.
 The reporter has made a *quære* to this case, whether any provi-

1. IF a man marries an orphan of London, who dies before twenty-one, her share shall survive to the husband, and not go to the other children; for the custom cannot take place where the orphan

is

is married, and her interest thereby becomes vested in her husband.

ment, be an advancement? It has been held that sums of money given by a freeman of London to a daughter, if not given as a marriage portion, or in pursuance of a marriage agreement, is no advancement. *Vide Jenks v. Holford*, 1 Vern. 61.—In *Chase v. Box*, 1 Eq. Ab. 54. the recorder's certificate mentions that an advancement to exclude a child must be in consideration of marriage; and there is no instance of a sum of money given by a freeman to his daughter on any other consideration being a bar of the orphanage share. *Vide 3 Atk. 452.*

2. The husband settles lands to the use of himself for life, remainder to his wife for life, and farther agrees that she should hold and enjoy the same until his heir or executor should pay to her, or to her executors, administrators, or assigns, 100 l. She dies in the lifetime of her husband; and by a writing in nature of a will devises the 100 l. Held a good appointment in equity (a).

entitled to administration; and so it seems to have been afterwards determined, for in *M. 1695*, in case *Sawyer v. Blesse*, 2 Vern. 328. it is said, that where a man conveys lands in trust out of the rents, to pay 6 l. per ann. for the separate use of his wife, and to be at her disposal, then to the use of himself, remainder to the heirs of the wife until the heirs or assigns of the husband shall pay to the executors, administrators, or assigns of the wife 100 l. with interest from the death of the husband; then to the wife for her life, for her jointure; remainder over. The wife dies first, having by her will disposed of this 100 l. Held, the wife dying in the lifetime of the husband had no power to dispose of this money *. And in this case it was agreed, that if a wife has a power to dispose of money in the life of her husband, she may dispose of it by a writing in nature of a will, though not so provided.

* The court in pronouncing the decree in this cause said, "It is observable that care is taken that the wife, notwithstanding the coverture, might dispose of the 6 l. per ann., but no such provision as to the 100 l.; and besides, it is reasonable to suppose, that if it had been intended the 100 l. should remain a charge on the estate, though the husband should survive, it would not only have carried interest during his life, but provision would have been made that the husband might redeem his estate in his lifetime. But the deed provides only that the heir of the husband might pay the 100 l."

A feme covert saves money out of her separate maintenance; she may dispose of it as a feme sole.

Vide Gore v. Knight, 2 Vern. 535. and *Prec. in Ch. 255.*
Vide Powell v. Hankey, 2 P. Wms. 82. where the wife, after her husband's death, was not permitted to recover the arrears of her separate interest.

3. Where a legacy is given to a feme covert, payment to her alone is not good, and the executor shall pay it over again to the husband.

M. 1684, cor. North, C. S.
Palmer v. Trevor, 1 Vern. 261.
1 Eq. Abr. 58. 301.

4. A voluntary bond by the husband after marriage to make a jointure on his wife; he makes a jointure, and the wife gives up the bond; the jointure is evicted; the widow (there being no other debts) shall have her jointure made good out of the personal estate, and the giving up of the bond by the wife during her coverture shall not bind her.

H. 1686, cor. M. R.
Beard v. Nuttall, 1 Vern. 427.
1 Eq. Abr. 221. pl. 6.

bond was delivered up. For an agreement, though voluntary, under hand and seal, ought to be decreed in equity.

The plaintiff was also entitled to dower, to recover which she was left at liberty to proceed, and what the dower should fall short in value of the jointure should be retained by her out of the value of the estate, notwithstanding the

5. A copyholder for life, where by the custom there is a widow's estate, agrees to sell for his own life, and the life of such widow as he should leave, and dies. His widow is not bound by this agreement;

P. 1688, Canc.
Musgrave v. Dabwood,
2 Vern. 45. 63.
1 Eq. Abr. 25. pl. 5.
In cases of an agreement by one joint-tenant to sell, it would

be strange to decree that this should bind the survivor.

In *Hinton v. Hinton*, Amb.

277. *Ld. Hardwicke* said, this

case is ill reported, and not an authority for me to ground my judgment on. (No state of it appears in the Register Book.) Amb. says Lord H.'s reasoning was against the sentiments of the bar.

T. 1688, Canc.

Kingdom v. Bridges, 2 Kern. 67.

1 *Eq. Abr.* 70. pl. 12.

242. pl. 5.

ment; for if such contracts for copyholds were allowed, all lords would be defrauded of their fines.

6. *A.* purchases a walk in a chace, and takes the patent to himself and his wife, and *J. S.* during their lives, and the life of the survivor. The husband dies indebted, yet the wife decreed the benefit of the patent during her life, (as her provision and advancement, for she cannot be a trustee for her husband,) though *A.* had not left assets to pay his debts; but after her death, *J. S.* to be a trustee for the executor of the husband, and apply the estate to the payment of his debts.

P. 1689, cor. Lds. Comrs.

Vandenanker v. Desbrough,

2 Vern. 96, 97.

1 *Eq. Abr.* 53. pl. 3.

Vide Drake v. Mayor of Exeter,

1 Ch. Ca. 71. cited 1 *Eq.*

Abr. 52. pl. 1. — A lessee for

years becomes bankrupt. The

assignee under the commission is

not entitled to the benefit of a

covenant for renewal, the clause

in the statute being that the assignee may perform conditions not broken, and conditions performable.

7. Devise of 800 *l.* to be invested in land for the benefit of the wife of *J. S.* for her life, and afterwards for her children, and the interest of the money to go as the profits of the land, if bought. *J. S.* becomes a bankrupt. The interest of the 800 *l.* shall not go to satisfy the creditors, this not being a trust created by the bankrupt, but by the wife's relation, and intended for her benefit.

T. 1689, cor. Lds. Comrs.

Co. of Portland v. Prodgart,

2 Vern. 104.

1 *Eq. Abr.* 63. pl. 3, 171. pl. 1.

8. A wife, whose husband is by act of parliament banished for life, may make a will, and in every thing act as a *feme sole*, and as if her husband was dead.

H. 1690, cor. Lds. Comrs.

Back v. Andrews, *Proc. in Ch.* 1.

2 Vern. 120.

2 *Eq. Abr.* 230. pl. 2.

9. *A.* purchases a copyhold estate, and takes the surrender to himself, his wife, and daughter, and their heirs. The husband and wife as one person take a moiety by *intireties*, so that the husband cannot alien nor dispose of it to bind the wife; and the other moiety is well vested in the daughter. The husband made a conditional surrender of this estate by way of mortgage, and died. The mortgage is void, and no relief in equity.

M. 1693, Canc.

Carey v. Taylor, 2 Vern. 302.

1 *Eq. Abr.* 69. pl. 10.

The decree in this case does

not appear, the reporter only refers

to it. *Vide, ergo*, Reg. Lib.

It was admitted on all hands,

that the share which *B.* was en-

titled to of her father's personal estate was a vested interest, and that before any distribution made or

the time limited by the statute was expired; but the question was, whether it was so vested as a legacy

assented to, as to belong to the husband without taking out administration to his wife, which the plaintiff

as administrator of the husband insisted upon.

10. One dies intestate, leaving *B.* a daughter, the wife of *J. S.* The daughter dies intestate, and afterwards the husband dies intestate; and the question was, whether the share of the daughter shall go to her own administrator, or to the administrator of her husband?

11. Where a woman on her marriage reserves a power to dispose of her personal estate, all that she dies possessed of is to be taken to be her separate estate, or the produce of it, unless the contrary can be made appear; and as she has power over the principal, she may dispose of the interest.

709. Bro. Rep. 16. *Powell v. Hankey*, 2 P. Wms. 82. Where the wife after the death of her husband was not permitted to recover the arrears of her separate interest.

H. 1705, cor. Cowper, C. S.
Gore v. Knight, 2 Vern. 535.
Proc. in Ch. 255.
1 Eq. Abr. 66. pl. 4.
Vide 1 Vern. 245. 2 Eq.
Abr. 149. c. 2. 1 P. Wms. 126.
2 P. Wms. 316. 1 Ves. 303.
518. 2 Vef. 191. 3 Atk. 695.

12. *A.* devises the surplus of his personal estate to his daughter, the wife of *B.*, for her separate use, and makes her executrix, without naming any trustees: part of the personal estate of *A.* consisted of a mortgage. *B.* the daughter's husband agreed by writing under his hand, that his wife should enjoy it to her separate use; and the principal question in this case was, if the wife should so enjoy it without the interposition of her husband? The court doubted if a feme covert could have a property in personal goods*, the testator's intention being repugnant to the rules of law, and the husband's title being subsequent to the will. This point was therefore reserved as a case to be argued; but as to the mortgage, though the agreement of the husband not to intermeddle was voluntary, yet it was presumed to arise from his sense of the testator's intention founded on *natural justice*, though not on *contract*; therefore the court thought clearly the husband was bound by his agreement. And Lord Chancellor said, that if a real estate were devised to a feme covert for her separate use, and a declaration that the husband should not intermeddle with the profits, but that the wife should separately enjoy, he doubted this would be a repugnant clause, and the husband would still enjoy them (a).

T. 1710, cor. Cowper, C.
Harvey v. Harvey,
1 P. Wms. 125. 2 Vern. 659.
1 Eq. Abr. 58. pl. 7.
2 Eq. Abr. 149. pl. 3.

* Vide *Burton v. Pierpoint*, 2 P. Wms. 78.

(a) It does not appear either in P. Wms.'s report of this case, or in Vern. 659; nor even in the Register Book, what was Lord Cowper's final determination on this point; but the case of *Bennet v. Davis*, 2 P. Wms. 316. seems to have settled it. Vide also *Rolfe v. Budder*, Bunb. 187.—In *Darley v. Darley*, 3 Atk. 399. the husband was held a trustee to the separate use of the wife of an estate devised to him for the *livelihood of his wife*.

13. A wife having power to dispose of her personal estate, which only comprehends what she had before marriage, gets afterwards into the possession of a large personal estate, in a private manner, upon the death of her father; and concealing the same from her husband, disposes thereof to charities. Held, that what was so concealed from the husband, should not be made good to him, so as to disappoint the charities.

11 May 1711, Dom. Proc.
Pilkington, Bart. v. Cutbertson Widow, 1 Bro. P. C. 337.
4 Vin. 131. c. 7. 483. c. 23.
Gro. & Rud. of Law and
Eq. 122. c. 23.
2 Eq. Abr. 149. c. 4. 5. 191.
c. 4.

14. A woman having been used with cruelty by her husband, becomes entitled to 3000*l.* as her share of her mother's personal estate, who dies intestate.

P. 1711, cor. Harcourt, C. S.
Nichols v. Danvers, 2 Vern. 671.
1 Eq. Abr. 68. pl. 7.
Vide *Williams v. Callow*,
2 Vern. 752.

Oxenden v. Oxenden,
2 Vern. 493.

Mem. The husband in the principal case gave his wife a note, that if he should again use her ill, she should have her share of her mother's estate to her own use.

29 June 1713, Dom. Proc.
Eustace Widow v. Keightley,
1 Bro. P. C. 405.

testate. Decreed, the money to be put out, and the interest paid to the wife for her separate use, and then to the husband for life, if he survived her, and the principal to be paid to the issue; and if no issue, to the survivor of husband and wife.

15. *A.* upon his marriage with *B.* settles lands of 400 *l. per ann.* for her jointure, and covenants that if the particular lands so settled should not yield 400 *l. per ann.* clear, *B.* should have so much of the rents of the residue of the settled estate as should make up the said 400 *l. per ann.* *A.* being attainted of high treason, his estate becomes forfeited, and was granted by the crown to *J. S.* The particular jointure lands did not amount to 400 *l. per ann.* Held, that the jointress is entitled, as against the grantee of the crown, to have the deficiency made good.

8th May 1724, Dom. Proc.
Grove & Ux. & al. v. Hooke,
Widow, 1 Bro. P. C. 464.
5 Vin. Abr. 293. pl. 40.
2 Eq. Abr. 218. pl. 4.
389. pl. 1.

16. So, where lands are settled in jointure, and covenanted to be of 500 *l. per ann.* value, but the husband afterwards discovering a defect in his title, settles other lands, and declares them to be in recompence of all deficiencies, either in title or value of the lands before settled, the jointress shall have lands of the full value of 500 *l. per ann.* over and above the other lands, and all other provisions made for her by her husband's will.

M. 1714, Canc.
Atkins v. Dorobury,
Gilb. Eq. Rep. 88.
1 Eq. Rep. 45. pl. 9.
Vide 1 Ch. Ca. 232. 3 Ch.
Rep. 50. 1 Roll. Abr. 380.
2 Vent. 362.
Mitchell v. Eades, 2 Vern. 391.
Peters v. Soame, 2 Vern. 428.
Thomas v. Freeman,
2 Vern. 563.
Crouch v. Martin, 2 Vern. 595.
Turton v. Benson, 2 Vern. 764.

17. *A.* by will gives 300 *l.* to a feme covert, without creating any separate trust of it, made payable out of a reversion of land expectant on an estate for life. The legatee's husband makes an assignment of this legacy to trustees for the benefit of his children, and after by will taking notice of the legacy, devises it in like manner for the benefit of the children, and makes his wife executrix, and dies. The estate for life drops, and the widow applies to the executor of the first testator for the 300 *l.* legacy. The widow and executor come to an agreement that she should accept of 200 *l.* in full, and the land was sold. The widow joined in the sale, and the 200 *l.* was paid, and the widow gave a release. Bill brought by the children for the 300 *l.* legacy under their father's assignment and will. Decreed, that the husband had a power to extinguish or release the legacy, and had made a good assignment in equity, (though not at law as a *chose en action* only,) which he confirming by his will,

will, had bound his wife the legatee. The widow, giving no notice of this assignment to the executor, should be answerable for the 200 *l.* to the children, but as to the 100 *l.* which the executor had drawn her in to release, he should stand charged, for he ought at first to have paid the whole legacy; and though this legacy was charged on a fund which was not immediate for raising it, yet, being given to the wife *in presenti*, when the fund comes in it shall carry interest from testator's death, which must likewise go to the children.

18. It being agreed before marriage that the husband should have only so much of the wife's estate, and that she should have liberty to dispose of all the estate besides (which she should be entitled to) by her last will in writing; it was resolved, that 5000 *l.* which fell to her after marriage by the death of her brother should not go to her husband or his executors, but that she should have the power of disposing thereof, though at the time of the articles she had not any right or interest therein, and although at that time she could not grant or release the same, for *this being a covenant, shall enure according to the intent of the parties, and extend to a right in futuro*, where it is the apparent intent of the parties that the husband should have no more than the sum expressly mentioned, whatever happened.

19. Plaintiff and his lady intermarried in 1683, and some years afterwards an estate of inheritance of 100 *l. per annum* descended to the lady, whereupon baron and feme conveyed this estate to trustees, in trust, to permit the lady, notwithstanding coverture, and without the husband's control, to dispose thereof as she should by deed appoint, and to make a sale, if the lady should so direct. The lady by frugality saved 1400 *l.*, 790 *l.* of which she invested in *India* bonds, 200 *l.* in lottery tickets, and the residue in specie. Defendants were nieces to the lady, and as she had no children, she gave them (with her husband's privity) four *India* bonds, and lodged three more in the trustees hands, to be delivered by them to such person as should bring their note. One of the defendants got the bonds from the trustees, as the bearer of their note, and producing them to the lady, she said she must have the interest during her life, but they should belong to her nieces after her death.

Y 2

The

H. 1715, cor. Cowper, C.
Petts or Pott v. Lee,
 4 Vin. Abr. 131. pl. 8.
 2 Eq. Abr. 149. pl. 6.
A. on his marriage with *B.* articles that *B.* should enjoy her estate to her separate use, and should dispose of the surplus thereof by writing under her hand. *B.* saves a considerable part of her separate estate, and buys land, and then appoints (under her power) to a stranger. *B.* dies. *A.* prefers his bill to have her lands. Decreed, he should have these lands, but the decree was reversed in Dom. Proc. because bought with the savings of the wife's separate estate, which by her articles she could dispose of. Vide *Fowler v. Countess of Dorset*, cor. Jeffries, C. MSS. case cited.

P. 1719, cor. Parker, C.
Gold v. Rutland,
 1 Eq. Abr. 346. pl. 18.

The lady afterwards gave one of her nieces a canister containing 400 guineas and several broad pieces, to be divided between her and her sister, and she directed the trustees to divide the lottery tickets between them after her death. All this transaction was by word of mouth, but was fully proved in the cause. In 1712 the lady died, and her husband having taken out administration, brought his bill to have a delivery of the bonds, lottery tickets, and money. The nieces brought their cross bill to establish their right to their aunt's gifts. *Per cur.*—There is no difference whether the power was given to the wife before marriage or after, for if the disposition is to take place pursuant to the power, it must be strictly pursued: it should be taken more liberally if given after than before the marriage, for then the husband could have no temptation to prevail on his wife to relinquish it; and it must be intended he fully designed she should have the benefit of it. Decreed the whole 1400*l.* well disposed of to the nieces, in regard the money being paid to the wife was absolutely in her own disposal.

H. 1722, cor. Macclesfield, C.
Gardener v. Walker, 1 Str. 503.
Vide Anon. cited in *Nicholas v. Nicholas*, Prec. in Ch. 548.
Anon. 1 Eq. Abr. 64. pl. 1.
Toth. 114. S. C. *Winch v. Page*,
Bunb. 86. *Harrison v. Buckle*,
1 Str. 238. *Jewson v. Moulson*,
2 Atk. 420.

20. A considerable legacy was left to defendant's wife, for which he brought his suit in the spiritual court. The executor of the testator filed his bill, praying the direction of the court, and an injunction against the husband's proceeding in the spiritual court. The husband insisted that equity ought not to enjoin him, or interfere, unless he had filed his bill in equity for the wife's legacy. *Sed per cur.*—The money must be applied for the wife's benefit, for whosoever is the plaintiff does not alter the reason of the thing.

T. 1723, cor. M. R.
Norton v. Turwill, 2 P. Wms 144.
2 Eq. Abr. 152. pl. 14.

It is true, that a bond given by a feme covert is merely void, which differs from that of an infant, which is only voidable.

(a) *Vide Allen v. Papworth*,
1 Vez. 163. *Grigby v. Cox*,
1 Vez. 517. *Peacock v. Monk*,
2 Vez. 193. *Biscoe v. Kennedy*,
1 Bro. Ch. Ca. 17. (n.) *Hulme v. Tennant*, 1 Bro. Ch. Ca. 16.
Pybus v. Smith, 3 Bro. Ch. Ca. 340.

(b) That is, as between trustees and cestuy que trust. *Llewellyn v. Mackworth*, 2 Eq. Abr. 579. pl. 8. *Townsend v. Townsend*, 1 Bro. Ch. Ca. 554. *Vide etiam Blakeway v. Earl of Strafford*, 2 P. Wms. 373.

21. A feme covert having a separate estate, borrowed money on bond; ten years afterwards she made her will, and died. The husband after her death possessed himself of her ready money, and the bond-creditor filed a bill against him and the wife's executors for his debt. One of the executors admitted assets, but the husband insisted on the statute of limitations. Decreed against all the defendants, that the bond be paid out of the wife's separate estate (a), of which they had possessed themselves, for that was a trust estate for payment of debts, and a trust is not within the statute of limitations (b).

§ 4. *Feme's Acquirements after Marriage.*

B—a 325

22. Devise of a bond to the feme to her sole and separate use, it is as much her property as if it had been vested in trustees.

H. 1724, in Scacc.
Rolfe v. Budder, Bunb. 187.
Vide Twisden v. Wife,
 1 Vern. 161.

Bletsoe v. Sawyer, 2 Vern. 245. *Seymour v. Dilkes*, 17 Nov. 1718.

23. *J. S.* on his marriage with *F.*'s daughter settled 500 l. per annum on her, and after surrendered copyholds to the use of his will, and gave the same by will to his wife. Her father, a freeman of London, died, whereby she became entitled to one-fifth of one-third of his personal estate, and 1500 l. was reported due to *J. S.* in right of his wife, for payment whereof several specific securities of stocks were transferred to him and her jointly. *J. S.* afterwards made a new settlement (a), increased her jointure 300 l. per annum, but never altered his will. The stocks undoubtedly belonged to the husband: the only question is, whether he has not done something to alter that? An husband may purchase to himself and his wife, and here he takes to himself and his wife, which is the same thing; there is a considerable accession of fortune to the husband; and as this came by her, it would be very hard by equity to take from her what the law gives her; ergo, ordered so much of the bill as sought to make the stocks in their joint names the estate of the husband, to be dismissed.

T. 1725, cor. King, C.
Lanney v. Lanney,
Sil. Ca. in Ch. 48. 2 Eq.
Abr. 139. pl. 11.

(a) The settlement is a revocation of the will as to such lands as were comprised in it, but the copyhold is not included, and therefore passes by the will.

24. One devises lands in fee to his daughter, being a feme covert, for her separate use, without appointing any trustees; the husband is a tradesman, and becomes a bankrupt, yet the devised premises not subject to the bankruptcy; for as the testator had a power to devise the premises to trustees for the separate use of the wife, equity will supply the want of them, and make the husband trustee; and his assignees were decreed to join in a conveyance.

M. 1725, cor. M. R.
Bennet v. Davis, 2 P. Wms. 316.
 2 Eq. Abr. 114. pl. 6.
Vide Jacobson v. Williams,
 1 P. Wms. 382.
Bosville v. Brander,
 1 P. Wms. 458.
Rolfe v. Budder, Bunb. 187.
Darley v. Darley, 3 Atk. 399.
Hallington v. Gill,
 3 Term Rep. 620. (n).
Lee v. Prieaux,
 3 Bro. Ch. Rep. 381.

25. Husband after marriage purchases a term to himself and wife, and the survivor, and the executors, administrators, and assigns of such survivor. Husband assigns the term on mortgage, proviso to be void on payment of the money by him or wife, or the executors of him or wife; provided also that the husband, his executors or administrators, shall, until default of payment, quietly enjoy. Husband, seven years after, contracts debts, and dies. Decreed, that this settlement of the term, being after her marriage, is voluntary, and was always in the power of the husband; and the equity

T. 1726, cor. M. R.
Watts v. Thomas, 2 P. Wms. 364.

of redemption being reserved to him as well as to the wife; and being also in the case of creditors, was assets to pay debts.

25 Mar. 1728, Dom. Proc.
Freeman & al. v. More, Bart.
3 Bro. P. C. 378. Bunb. 205.
2 Eq. Abr. 26. c. 29.
See this case more fully stated
post, sect. 14. *Vide Mitchell v.*
Mitchell, Bunb. 207.

M. 1728, cor. King, C.
Coppin v. —, 2 P. Wms. 496, 7.
Vide Bond v. Simmonds,
3 Atk. 21.
Anon. 3 Atk. 726. Allen, 36.

T. 1729, cor. King, C.
Newsome v. Bowyer,
3 P. Wms. 37, 38.
2 Eq. Abr. 270. pl. 28.

Vide Judge Belknap's case.
Thomas de Wayland's case,
1 Inst. 133.
Lady Portland v. Progers,
2 Vern. 104.
Dearly v. Duchefs of Mazarine,
Salk. 116.
For an account of abjuration
see Mr. Cox's note to this case in
3 P. Wms. 39. or Dr. Sacheve-
rell's case in State Trials, vol. 5.
p. 693.

M. 1729, cor. M. R.
Nightingale v. Lottman & Ux.
Mof. 231. Fitzg. 148.

26. Articles of agreement between husband and wife are good without the intervention of trustees; married women having separate estates, being considered in equity as single women with regard to such estates; and therefore have an absolute power of disposing of them in favour of their husbands, or any other person, notwithstanding their coverture.

27. Baron and feme bring a bill to redeem a mortgage; defendants plead to the bill, and the plea being over-ruled, 5s. costs are given to the plaintiffs. Baron dies; the feme by survivorship shall have the costs. Where a bond is given to the baron and feme during the coverture, on the death of the baron it will survive to the wife, as all other *choses en action* do.

28. A. was attainted of felony, and was afterwards pardoned on condition of transporting himself, and remaining in exile during his life. After his departure, a considerable personal estate fell to his wife as an orphan of London. It was insisted, that this personal estate belonged to the husband, who by his pardon was rendered capable of taking. On the other side it was contended to be the same as if the husband had been banished, or had abjured the realm, and that the wife could sue as a feme sole. Lord Chancellor hesitated in his opinion, but expressed a desire to assist the wife. His lordship thought this no banishment, which could only be by act of parliament; neither could it be resembled to abjuration. His lordship ordered it to come on in a petition by way of case. But by the Register's Book 18th March 1730, it appears that the personal estate, which came to the wife, was ordered to be laid out in the funds, with the approbation of the Master, and the dividends to be paid to her for her maintenance until further order. Afterwards, on the husband's death, she married again; and on the petition of the second husband and wife, the whole of the principal and interest was transferred to the second husband.

29. A bill is filed against husband and wife, and others; the court declared, that such a certain share of the testator's estate, after payment of debts,

debts, belonged to the wife, and such a certain share to the plaintiffs, and decreed a distribution accordingly; and that 10,000 *l.*, part of the assets, should be brought before a Master, to be put out at interest, for the benefit of the parties to whom it should appear to belong. This is only in nature of an interlocutory judgment; and if the husband dies, the wife's share of the 10,000 *l.* survives to her.

Vide 1 Vern. 161. 2 Vern. 190. 707. 68. 404. 501. 1 Ch. Ca. 41. 181. 189. 4 Inst. 85, 86, 87. Suppl. to Wentw. 310. Swinb. pt. 2. sect. 9. n. 13. Moor, 339. Ca. 359. Bro. Abt. tit. Test. n. 11. Fitz. Abr. tit. Ex. n. 109. Swinb. pt. 6. sect. 7. n. 7.

30. *J.* devises 100 *l.* per annum to his son *A.* and his wife, for their respective lives, 60 *l.* whereof to be paid to the wife for the support of herself and daughter, the remaining 40 *l.* to the son; the son dies; his wife shall have the whole 100 *l.* per annum.

H. 1731, cor. Jekyll, M. R. Cowper v. Scott & al. 3 P. Wms. 121.

31. *J. S.* by will gives to his daughter *A.* (then wife of *B.*) his gold watch, jewels, china, and household goods, to be at her disposal, and to do therewith as she should think fit. Testator dies; the daughter's husband becomes a bankrupt. This is a devise to the separate use of the wife, and not assignable by the commissioners; and so decreed.

1733, cor. M. R. Kirk v. Paulin, 2 Eq. Abr. 115. pl. 9. 7 Vin. Abr. 95. pl. 43. Note; A case was cited as before Lord Cowper of a devise to a feme covert for her use and benefit, and held, that it not being for her separate use it was the husband's, but his Honor was dissatisfied with the determination, as against the intention of the testator.

32. Lady Shovel had devised 4000 *l.* in trust for the separate use of a feme covert; and upon a bill brought by husband and wife against the trustees, though the wife herself was in court, and consented that the money should be paid to her husband, yet the Master of the Rolls would not decree it, but dismissed the bill.

M. 1734, cor. M. R. Blackwood v. Norris, cited in Penn v. Peacock, Ca. temp. Talb. 43. Lord Talbot said, this was a case of personality only, and somewhat particular.

33. *A.* devised the residuum of her personal estate (being about 2000 *l.* value, and most of it South-Sea stock) to *B.* by her maiden name, (not knowing her to be married,) and made her executrix, the husband agreed to settle it to trustees in trust for himself and wife, and the survivor. A transfer is made accordingly. The wife's trustee drew a declaration of trust, whereby this stock was to be settled upon the husband and wife for their lives, and for the life of the longest liver of them, then to the issue of the marriage, and for want of issue, to the wife, her executors and administrators. The husband objected to this declaration; and by letter directed to the same trustee, he desired that the trust might be declared jointly for himself and his wife for their lives, and after to their issue, and then the survivor to take the whole; but before such declaration was

H. 1735, cor. Talbot, C. Fort v. Fort and another, Ca. temp. Talb. 171. 2 Eq. Abr. 144. pl. 16.

As the testatrix made the plaintiff executrix and residuary legatee by her maiden name, not knowing her to be married, it would be hard to say this 2000 *l.* did vest absolutely in the husband, notwithstanding the case 3 Lev. 403. especially as by being executrix she is chargeable with debts. Whatever right the husband had to the stock, he had it singly through his wife, subject to the several agreements made for settling it, and it was but reasonable it should be settled, the husband having made no provision for her. The first agreement was complete on both sides, and the subsequent transfer of the stock

to the trustees must be taken to be done in pursuance of that agreement, and not to convey away all the wife's right, which was settled by that agreement, to which this transfer relates, and is a completion of.

executed, the husband died *intestate* without issue, and his wife administered. *Talbot, C.* was of opinion, that upon her surviving her husband, the stock was become her sole and absolute property, and so decreed, the defendants the trustees of this *South-Sea* stock, to be trustees for the wife in *her own right*.

17 Feb. 1737, cor. Hardw. C.
Cecil & Ux. & al. v. Juxon & al.
1 Atk. 278.

34. One *Juxon*, a few years after his marriage, left his wife and two small children, and went abroad, and did not see either her or them for fourteen years; the wife's mother during this time intrusted her with millinery and other goods, and permitted her to maintain herself and children out of the profits. The husband upon his return broke open the wife's house, and took away all her goods, and the produce of the stock so lent by her mother. A bill (*inter alia*) was brought by the mother for the re-delivery of the goods. The court held, that what the wife had acquired in her husband's absence to support herself and family, is *her separate property*, and not liable to the disposition of the husband; and that what he had forcibly taken, he must deliver in specie; or if disposed of, he must pay her the value as set upon it by a Master.

18 June 1737, cor. Hardw. C.
On Appeal from the Rolls.
Medcalf Widow and another,
v. Medcalf & al.
1 Atk. 63, 4.

35. *A.* and his wife, covenant in articles before marriage in consideration of 2000*l.*, his wife's portion, to release all the right that might accrue to them out of her father's personal estate by the custom of *London*. The husband is bound by this covenant; and though the wife was under age, yet it is a matter that accrues to him in the right of his wife, and he may release it, and his release will bind her, and an award to the contrary set aside.

Vide Love v. —, 1 Vern. 6.
Hancock v. Hancock,
2 Vern. 665, 666.
Cleaver v. Spuring,
2 P. Wms. 527.

The husband's covenanting to release is an extinguishment of the wife's right to the orphanage part; and if so, leaves the estate of the father as if it had never been charged, and therefore must be considered as part of his general personal estate, and not go wholly to the father's executor as a part of the dead man's share.

P. 1739, cor. Hardw. C.
Leighbourn v. Holyday,
2 Eq. Abr. 1. pl. 5.

36. Plaintiff gave a feme covert a promissory note, and the husband dying before answer to a bill brought for discovery of the consideration, the suit was abated; for a feme covert can have no separate property.

37. A legacy of 60*l.* was devised to a feme covert: the husband dies before the legacy becomes payable; it is in the nature of a *chose en action*, and will survive to the wife; for it cannot be presumed that the husband had released it,

cree for the legacy, and had died before he received it, it would have gone to the wife. This was determined in the case *Nanney v. Martin*, 1 Ch. Ca. 27. 2 Ch. Rep. 234.

P. 1740, in *Scacc.*
Brotherow v. Hood,
2 Com. Rep. 725.
2 Eq. Abr. 144. pl. 17.
Vide Com. Dig. tit. Baron and
Feme (F. 1), Forr. 171.

If the husband had had a de-

38. *J. D.*, who died intestate, left three sisters; his personal estate being agreed to be divided into thirds. Two mortgages, the one in fee the other for a term, each for 150*l.*, were allotted to the defendant, one of the sisters: before any assignment her husband borrowed 200*l.* of the plaintiff upon note; and, as a further security, left the two mortgages with him, and gave his note, promising to assign them, and then dies. Bill brought against his administrator, and against the mortgagors, to be paid principal and interest, or to foreclose. Lord Hardwicke held, that the husband's promise to procure an assignment of the mortgages amounted in equity to a disposition of them pro tanto, so as to satisfy the plaintiff's debt; which being done, they belong to the wife as her *chofes en action*.

16 July 1741, cor. Hardw. C.
Bates v. Dandy, 2 Atk. 207.

39. The wife has a rent-charge devised to her for life, issuing out of a freehold estate. The husband during the coverture may have a legal remedy by distress for the arrears, but he cannot convey it away to her prejudice; for if she survives, she will have her rent-charge again.

22 Feb. 1742, cor. Hardw. C.
Fitzer v. Fitzer and another,
2 Atk. 511.

The court will not hinder the husband of his legal remedy by distress till he has made some provision for his wife, any more than they would do it where a man marries a woman seised of lands in fee.

Even in the cases of bankrupts the court have not determined that creditors are not entitled to the interest of the husband, during his life, in the wife's *chofes en action*; but have recommended it to them to allow the wife a provision, and take the rent to themselves.

Vide *Jewson v. MouWen*,
2 Atk. 417.

40. In September 1715, *A.*, upon his marriage with *B.*, covenanted that his heirs, &c. should lay out 20,000*l.* in the purchase of lands, and settle them to the following uses, viz. to himself for life, then to the intent that his wife should receive 800*l.* per ann. for her life as her jointure in lieu of dower, then to his first and other sons in

20 Nov. 1742, cor. Hardw. C.
Oldbam v. Hagbri, 2 Atk. 452.

A bill was brought in this case, to have 20,000*l.* in money and 20,000*l.* South-Sea annuities invested in land, pursuant to agreement. M R. decreed the annuities to be sold and laid out in land; and the present case is an appeal from his Honour's decree.

in tail male, with remainder to his own right heirs. *A.* died in 1723 without laying out the 20,000*l.* in a purchase, or leaving any issue: his heirs at law were *C.* his sister, married to *D.* the defendant, and *E.* the plaintiff his nephew by another sister. *A.* was a freeman of *London*, and his widow became entitled to one moiety of his personal estate, and *D.* and his wife, and the plaintiff *E.*, to another moiety as next of kin. Articles of agreement were entered into in 1724 between the next of kin and the widow, wherein it was covenanted, that 20,000*l.* South-Sea annuities should be transferred to trustees, who should sell them, and lay out the money in land, and settle it to the same uses as were in the former articles, with a contingent proviso, that if the widow died before the money was laid out it should go to *D.* and his wife, and to *E.* equally, according to their respective interests; and by these articles *D.* and *E.* covenanted, that if the stock should fall short to answer the widow's annuity of 800*l.* they would make it good. The stock was transferred to trustees, and one of them laid out 164*l.* annihilation-money to make up 20,000*l.* South-Sea stock. *C.* died, whereby the plaintiff became entitled as heir to all her real estate; but *D.* contended, that the subsequent articles had turned the money realised by the former into personal estate again, and that thereupon he became entitled to his wife's share as her administrator. *Lord Hardwicke was of opinion, that the wife was not capable of changing the nature of her estate by articles, because under coverture and unable to contract.*

S. C. Before the wife could in this case have altered the property or course of descent, the money must have been invested in land, and then she might have levied a fine of it, and given it to her husband; or, upon coming into court, and consenting to take this money as personal estate, and being examined as to such consent, it binds the money article to be laid out in land as much as a fine at law would the land, and she might dispose of it to her husband.

S. C. At law, money so article to be laid out in land is considered barely as money till the investiture, and equity alone views it in the light of the real estate; therefore this court can act upon it as its own creature, and do what a fine at common law can upon land.

S. C. Lord *Hardwicke* was of opinion, that the articles in 1724 do not import any variation of this estate from real to personal; for it being agreed that the 20,000*l.* should be transferred to trustees to buy land to be settled to the same uses as in the articles of 1715, there is no doubt but this money is to be considered as realised, and the articles have made no conversion of the estate from real to personal.

S. C. The whole produce of the 20,000*l.* *South-Sea* annuities is to be laid out, when sold, in the purchase of land, and not 20,000*l.* in money only; as all the parties, having any interest in the personal estate of *A.*, agreed they should be transferred to trustees to sell, and lay out in land the money arising thereby.

Note; It appears that 20,000*l.* *South-Sea* annuities were then more than equal to 20,000*l.* in money, and that the whole produce was decreed to be laid out in land.

41. Where a feme covert has a separate power over her estate, and may dispose of it by will, whatever sort of writing she leaves ought first to be propounded as a will in the spiritual court; and if no executor is therein appointed by her, the spiritual court will grant administration to the husband with such testamentary paper annexed.

5 July 1744, cor. *Hardw. C.*
Rofs v. Ewer, 3 *Atk.* 160,
Vide *Dormer v. Thurland*,
2 *P. Wms.* 506.

S. C. Where a power to dispose by will requires that the will should be sealed, the sealing of such will cannot be dispensed with.

Vide *Bull. N. P.* 2 edit. p. 263.
and *Will. Rep. B. R.* 313.

42. Diamonds given to the wife by the husband's father on her marriage with his son are considered as a gift to the separate use of the wife, and she is entitled to them in her own right.

24 Nov. 1746, cor. *Hardw. C.*
Grabam v. Londonderry,
3 *Atk.* 393.

A present by a stranger to the wife during coverture must be considered as a gift to her separate use, though not so clear a case as the other.

Money was appropriated for a wife's separate use, and was decreed for her accordingly.

Vide *Mrs. Hungerford's case*.

Trinkets given by a husband to his wife determined to be her separate estate.

Vide *Lady Cowper's case*, *Lucas v. Lucas*, 1 *Atk.* 270. *Brinkman v. Brinkman*, 19 Nov. 1740.

Where a husband gives things expressly to a wife to be worn as ornaments of her person only, they are to be considered merely as paraphernalia; for if they were to be considered as a gift, she might dispose of them absolutely contrary to his intention.

A husband may alien the jewels a wife wears for the ornaments of her person.

If a husband pledges the wife's paraphernalia, and leaves a sufficient estate to redeem the pledge, she

Vide Tipping v. Tipping,
1 P. Wms 730.

she is entitled to have it redeemed out of his personal estate.

The right of a wife to paraphernalia is to be preferred to that of a legatee, which is a stronger case, and has been followed by the court ever since.

As the diamond necklace in this case has been sold, *Lady Londonderry* is entitled to an account according to the value at which it has been sold.

6 Dec. 1746, cor. Hardw. C.
Darley v. Darley, 3 Atk. 399.
In *Lee v. Prieux*, 3 Bro. Ch. Ca. 383. Sir R. P. Arden, M. R. said, this case, as it stands in Atk. is of no authority, but his Honor there stated the case correctly from the Register Book, fo. 263. A. 1746.

43. Where an estate is given to a husband for the *livelibood* of his wife, he may be considered as a trustee for her *separate use*.

To make a separate trust technical words are not necessary. The word *livelibood* is sufficient to shew the intention of the testator, that it should be for her *sole and separate use*.

There is no case where it has been held that a mere voluntary promise of a husband to a wife, and executory only shall be carried into execution by the court of Chancery; for it is *nudum pactum*.

2 Mar. 1747, cor. Hardw. C.
Coomes v. Elling & Ux.,
3 Atk. 676.

44. If a freeman of London disposes of his property in such a manner as not to take place till after his death, it is a fraud on the custom.

In this case the freeman possessed of a personal estate lays it out in the purchase of a leasehold estate for the joint lives of himself and wife. The consequence is, that the husband might have disposed of the whole.

It was said if the wife survives, the moment the husband is dead this is to be taken out of his personal estate; for that it does not come to her by the gift of the husband, but by the operation of law *jure accrescendi*: and yet it must be allowed, that the husband in his lifetime had equal power to dispose of this as any other part of his personal estate; for the wife cannot during the coverture acquire any property distinct from the husband.

If it had been conveyed to trustees for the separate use of the wife in possession, Lord *Hardwicke* was inclined to think such a gift would have been good.

Decreed the leasehold estate so purchased to be sold before the Master, and the produce to be applied in like manner as the rest of testator's personal estate.

45. Appointment by a will by a feme covert pursuant to a power must be executed strictly according to the requisites in the power.

16 Nov. 1748, cor. Hardw. C.
Burnet v. Man, 1 Ves. 157.
Vide Lady Roscommon v. Fouke,
in Dom. Proc.

46. A woman seised of copyhold lands marries, and during coverture, without her husband's joining, but in his presence, surrenders her copyhold to the use of her will or appointment, and then devises it to A. The fact of the surrender not being before the court, it was sent to be tried.

13 Ap. 1749, cor. Hardw. C.
Taylor v. Philips, 1 Ves. 229.
Ld. Hardw. doubted how far
this surrender could be good to
the use of the will. The person
must take the lands by the sur-
render of which the instrument of
appointment only directs the uses,
because he must come under the
estate of the lord, and by that

medium there must be a surrender into the hands of the lord to make an appointment effectual, whether it is to take place immediately or in futuro. The quere then is, if the wife can make such a surrender? A surrender differs from a fine, which is good against the wife's heir by estoppel, though it passes no estate; but if a surrender is bad, there will be no estoppel. Though the fact of the surrender was not before Lord Harwicke, his lordship inclined to think that the frame of the surrender created a probability that there may be such a surrender, otherwise it is strange that the steward should take it when the husband was present.

47. Where a personal estate is given to the separate use of a feme covert, she is considered as a feme sole, and may dispose of it, and all that accrues, where she is beyond the age of seventeen.

30 May 1749, cor. Hardw. C.
Hearle v. Greenbank and others,
3 Atk. 709. 1 Ves. 303.
Several of the books say an
infant above fifteen may give a
personal estate by will.

48. A. W. gives (by will) his moiety of G. W.'s estate to E. C. for life, remainder to E. K. for life, remainder to such of the children of E. K. as should be living at her decease. This was directed by the court to be laid out in *South-Sea* annuities, and the interest to be paid according to testator's will. The husband of E. K. assigns this legacy to one B. to secure 150*l.* upon a contingency mentioned in his assignment which recited the decree: the husband became bankrupt before the contingency happened upon which his wife was to take. B. waived his assignment, and chose to come in as a general creditor, and assigned the legacy to the bankrupt's assignees. One of E. K.'s children petitioned that the *South-Sea* annuities might be transferred to her as one of the legatees of A. W. *Per curiam*.—A husband cannot in law assign the wife's possibility nor his own possibility, but equity will support such an assignment for a valuable consideration. This case is rendered particular by a decree, which ordered the money to be paid to the usher of the court; and also in regard that the husband's assignment to B. was not absolute, but in the nature of a security only, and is now come back into the hands of the assignees of the husband. The particular assignee having taken with notice of the wife's equity, and the bankrupt's

31 July 1749, cor. Hardw. C.
Grey v. Kintib, 1 Atk. 280.
This case is not properly re-
ported by Atkins, for by the Re-
gister Book, fo. 532. A, 1748,
the bankrupt was one C., who
married one of the children of
E. K., and who made the assign-
ment to B. in the mother's life-
time; and C. having died before
the mother, his wife, on her mo-
ther's death, petitioned to have
her share of the *South Sea* an-
nuities transferred to her, which
was ordered accordingly, notwith-
standing the opposition of the ge-
neral assignees of C.

bankrupt's assignees taking subject to the same equity, it is the wife's property, and decreed the stock to be transferred to her.

26 July 1750, cor. Hardw. C.
Ward v. Shallett, 2 *Vez.* 16.
See this case fully stated, *post*, f. 9.

49. A wife has a contingent interest under a bond given by her husband before marriage. Afterwards she has a legacy from her father, which is not protected by trustees. With the privity and consent of her friends she parts with her contingent interest under the bond, and a new settlement is made on her by agreement. This is good against the creditors of the husband.

27 June 1755, cor. Hardw. C.
Tomkyns v. Ludbrooke, 2 *Vez.* 591.
Ld. C. said he would not make a decree to defeat the custom.
His lordship cited *Blunden v. Barker*, 1 P. Wms. 634. *Rawlinson v. Rawlinson*, 8 July 1714.
Hancock v. Hancock, 2 Vern. 665., and *Hall v. Lumley* in 1740 there cited, which his lordship said was a settled case.

50. A freeman, on the same day with his will, by deed assigns part of his personal estate in trust for the separate use of his daughter; he was then aged seventy-two, ill of the gout, and died in two days after. The daughter had been married without consent, but the testator was reconciled; on a bill by the husband to set aside the testator's assignment. Held this is a testamentary disposition in fraud of the custom, and may be disputed by the husband of the daughter.

28 July 1755, cor. Hardw. C.
Pawlett v. Delaval,
2 *Vez.* 669, 670.

51. Though the bill of the husband and wife in her right is the bill of the husband, yet where a proper settlement is made, the court will decree the money to the husband and wife jointly, and not to the husband alone; so that he may receive it if he lives, and if he dies it will survive to the wife.

21 Oct. 1755, cor. Hardw. C.
Garforth v. Bradley, 2 *Vez.* 676.
Vide Parker v. Windham,
Prec. in Ch. 412.

52. A settlement in consideration of marriage, the wife's present fortune and subsequent covenants; one of which was, that the mother should give to the wife, or any child, equal to what was given to the rest. The mother leaves the wife a legacy, and by lapse part of the residue also comes to her: the wife survives the husband. What the husband had not reduced into his possession goes to the wife's representatives by survivorship, not to his; there being no contract to give him a certain right.

30 July 1764, cor. Northampton, C.
Bramball v. Hall,
Amb. 467. 1 *Eq. Abr.* 61.

53. By marriage articles J. S. covenanted that his intended wife, who was seized of an estate in fee, should have power by deed or will to dispose of her estate after her death to any person whomsoever, and that he would do any act to confirm the same. Subsequent to the marriage she conveyed to trustees by lease and release, (reciting the articles,)

articles,) to the use of her natural son. Afterwards she and her husband joined in a fine of the premises to other uses. *Per Northington, C.*—The wife having the legal estate, the lease and release were not good to pass her estate, either as a conveyance or as an execution of a power; so the estate passed by the fine.

54. By marriage-articles a power was reserved to the wife of disposing of her estate real and personal by deed or will. She being entitled to the trust of an estate during coverture, devised the same by virtue of such power. *Per cur.*—The articles were a good reservation of the estate, and the will is a good appointment (a).

M. 1764, cor. Northington, C.
Wright v. Englefield and another,
Ambl. 468. 1 Eq. Abr. 61.

Wright v. Ld. Cadogan (next case) seems to be S. C. affirmed in Dom. Proc.

(a) *Churchill v. Devett*, Feb. 1754.

There are many instances where the court had refused to assist the defect of an intended legal conveyance against the heir, if there was not a meritorious consideration *; but here the provision is for children, therefore meritorious.

* *Vide Bramhall v. Hall*, in which case the consideration was not meritorious.

55. A woman, entitled to the trust of a reversion in fee of lands, enters into articles previous to her marriage, whereby it is stipulated, that all her estate shall be conveyed to trustees for her own use, and subject to her own appointment. The marriage takes effect, and she afterwards makes an appointment in favour of her husband and children. Held, that this appointment was good, although no conveyance of the reversion was ever executed; nor any fine thereof levied.

8 Dec. 1766, Dom. Proc.

Wright v. Ld. Cadogan,
6 Bro. P. C. 156.

This seems to be the same case as *Wright v. Englefield*, ante.

56. A real and personal fund was ordered to be converted into money; the produce to be paid to the wife of the bankrupt for life without farther disposition. The third part of the personal estate (which belonged to the wife as one of the next of kin) was so vested in her on the death of the testator as to go to the husband's assignees, and is not a new interest arising to him upon her death.

P. 1789, cor. Thurlow, C.
Robinson v. Taylor and another,
2 Bro. Ch. Ca. 589.
Vide Miles v. Williams,
1 P. Wms. 249.
Bosvil v. Brander,
1 P. Wms. 460.
Saddington v. Kinsman.

57. Where personal property is given to a feme covert to her sole and separate use, she may dispose of it by will without the assent of her husband.

M. 1789, cor. Thurlow, C.
Fettiplace v. Gorges,
3 Bro. Ch. Ca. 8.
Vide Peacock v. Monk,
2 Vef. 190.

Wright v. Lord Cadogan,
6 Bro. P. C. 156. *Hearle v. Greenbank*, 1 Vef. 298.

Note; Ld. Chancellor (in this case) said, "All the cases shew that personal property, where it can be enjoyed separately, must be so with all its incidents, and the *jus disponendi*, is one of them."

58. A feme covert is a feme sole, as far as the instrument creating her separate estate makes her proprietor;

21 June 1790, cor. Thurlow, C.
Pybus v. Smith, 1 Vef. jun. 189.

This cause came on upon the report in Aug. 1791,
Vide 3 Bro. Ch. Ca. 340.
Vide Ld. Loughborough's observations on this case, post, c. 7.

T. 1792, cor. Lds. Comrs.
Masters v. Fuller,
 4 Bro. Ch. Ca. 19. 1 Ves. jun. 513.

T. 1792, in Scacc.
Sower v. Shute, 1 Anstr. 63.
Vide Campbell v. French,
 3 Ves. jun. 323.

Note; It would be very difficult to direct any mode of settlement which would not be done away by the Prussian laws.

T. 1793, in Scacc.
Hardwick v. Mynd, 1 Anstr. 274.

T. 1793, cor. Loughb. C.
D. of Bolton v. Williams,
 2 Ves. jun. 150. 156.
 4 Bro. Ch. Ca. 309. 311.

proprietor; and if she pledges it according to her power, the trustees must hold to the uses she appoints: but where under her power she appointed for the benefit of her husband, and as a security for the payment of his debts, an inquiry into the circumstances was directed, and it was referred to the Master accordingly.

59. A married woman, having separate property, agrees with the landlord to pay an additional rent for her husband's house, unknown to him, in consequence of having it better fitted up. She dies, and the husband then discovering the agreement, files a bill for the return of the money, and to have the agreement delivered up as fraudulent on him. Bill dismissed without hearing counsel for the defendant.

60. A wife was entitled to a distributive share of an intestate's estate. The court took it into consideration whether they would order the money to be paid to the husband or settled on the wife. Upon reference to the Master he certified, that by the laws of *Prussia*, of which they were inhabitants, the whole personalty of the husband and the wife is absolutely at his disposal during the coverture, but on the death of either it is divided between the survivor and the heirs of the deceased. The wife made no application to the court to have it settled or otherwise. The court inquired what was the custom of *London* in such a case, and then ordered the money to be paid to the husband.

61. Where money is declared to be due to a feme covert, the court will not, on motion, direct it to be paid to the trustees on her marriage settlement till it is reported by the Master that there is a settlement, and then the court will order the money to be paid over according to the trusts. Nothing in this case was taken by the motion.

62. Where there is an assignment by a married woman of her separate property in the hands of trustees, the assignee may come for execution of the trust into equity; for her disposition is valid to the extent of her power: but a general creditor cannot come into equity to have his debt satisfied out of that property.

S. C. Equity will not make good against a married woman a contract on which she cannot be sued at law.

63. A feme covert, entitled to the interest of money for her life with power of appointment as to the principal, receives a part of the principal for her necessary support, and appoints to her husband, and dies. He cannot claim that part of the principal from the trustees received by her for her support.

for life, with a general power of appointment, the appointee does not take under the appointor but under the original will. The appointor is only the instrument to convey the first testator's bounty. Here the money was applied for the necessary support of the wife, which the husband was bound to do, and for which he became a debtor; and Thompson, Bar. added, that if the appointment had been to a stranger the trustees must be allowed this payment as against the husband, it being a debt contracted for his wife's support.

64. The rule that a *feme covert* is to be considered as a *feme sole* as to her separate property does not extend to transactions with her husband.

65. Husband and wife by indenture assigned (in trust for the husband) personal property bequeathed to the wife, and in possession of the administrator: the husband by will gave the residue of his real and personal estate in trust for his wife for life, remainder over, and died. Upon the bill of the wife and her second husband, the deed was delivered up to be cancelled on their waiving all benefit under the will.

S. C. An action against an executor by a husband, for personal property bequeathed to his wife, does not lie.

66. A testator gave 1000*l.* stock to a married woman for her separate use, and whenever she should die to be absolutely in her own power to dispose of it by will to such persons or purposes as she should think proper; but in case of failure of any such disposition or appointment to go over. This is not a power, but an absolute gift, qualified only to exclude the husband upon the death of the wife; therefore it passed by general words in her will.

67. A married woman living in *America* being entitled to a legacy, a commission to examine her would have been directed had she not been examined under a commission issued by the *American* government, which was considered sufficient. Lord Chancellor thought much depended on the law of the country where the party resides (a) whether the money might not be paid to the husband, but he apprehended that in *America* they disposed

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M. 1794, in Scacc.

Randall v. Hearle, 2 *Anstr.* 363.

Upon the subject of this ungracious claim of the husband, Ld. Ch. Baron was glad to find in his own mind a sufficient ground for rejecting it; he admitted the principle laid down, that where under a will one has the interest of a sum of money

M. 1794, cor. Loughb.

Miles v. Buss, 4 *Ves. jun.* 498.

De Corbett v. Poelnitz,

1 *Term Rep.* B. R. 5.

Pawlet v. Delaval, 2 *Ves* 663.

24 July 1795, cor. M. R.

Wright v. Rutter, 2 *Ves. jun.* 673.

23 Dec. 1796, cor. M. R.

Hales v. Margerum,

3 *Ves. jun.* 299.

This case is stronger than *Standen v. Standen*, 2 *Ves. jun.* 589, which has lately been affirmed in the Lords.

Vide Andrews v. Emmot, 2 *Bro. Ch. Ca.* 297. which is fully commented upon by Ld. Ch. in *Standen v. Standen*.

Vide also Buckland v. Bartop, 2 *H. Blackst.* 136. *Langham v. Neillay*, 3 *Ves. jun.* 467.

24 Feb 1797, cor. Loughb. C.

Campbell v. French,

3 *Ves. jun.* 323.

(a) *Vide Sawyer v. Shute*,

1 *Anstr.* 63.

exactly the same as in *England*. His lordship decreed the executors to transfer the legacies to the Accountant-General, with liberty for the legatees to apply by petition, without issuing any commission in this case.

Of the acts of a feme covert, and the responsibility of the husband for the same in cases where she cannot be considered a feme sole, see *post*, f. 6.

Of the private examination of a feme covert, and her consent to part with her personal property in analogy to a fine at law, *vide post*, f. 7.

Of the wife's paraphernalia and pin-money, see *post*, sect. 12.

Where a feme covert living apart from her husband, and having separate property, shall be considered a feme sole, *vide post*, f. 13.

Sec. 5. Of the Acts of the Wife when Sole, and how far the Husband shall be bound thereby.

P. 1682, Canc.
Gilmore v. Battison,
1 Vern. 48. 1 Eq. Abr. 17. pl. 4.
Vide Maynard v. Moseley,
where such an agreement after an
estate-tail was decreed, 1 Ch. Rep. 253.

1. A Greement parol by a feme whilst sole, that if she died without issue, she would leave her heir at law the land or 500*l.* decreed to be executed.

H. 1684, Canc.
Norton v. Sprig, 1 Vern. 309.
1 Eq. Abr. 60. pl. 4.
(a) But where there is no such fund out of which to make satisfaction for the breach of trust, the second husband must pay it, and take his wife chargeable with that as well as other debts. *Gilpin and Smith*, 1 Ch. Ca. 80.

2. Upon arguing exceptions to the Master's report, the question was, how far the second husband is liable to a *devastavit* and breach of trust of the wife, and her first husband. *Per cur.*—Where there is a bond there is a lien by deed, and the second husband is bound; but where the breach or debt is by simple contract, the plaintiff should follow the estate (a) of the wife in the hands of the first husband's executor.

P. 1685, Canc.
Blithe's case, 2 Eq. Abr. 25. pl. 2.
2 Freem. 91, 92.
Vide Cotton v. King, 2 P. Wms. 358. 674. Hunt v. Matthews, 1 Vern. 408. Howard v. Hooker, 2 Ch. Rep. 81. Poulson v. Wellington, 2 P. Wms. 533. Thomas v. Williams, Mof. 177. Lady Southampton v. Bowes, 2 Bro. Ch. Ca. 345.

3. An assignment by a widow (just before her second marriage, and without the privity of her second husband) of a term of years in trust for herself and child, held good; but a power reserved therein to dispose of the remainder of the said term after the decease of herself and child, held void, because such remainder, not being disposed of by her before marriage, vested in the husband.

H. 1686, cor. Jefferies, C.
Carlton & Ux. v. Ld. Dorset & al.
2 Vern. 17. 1 Eq. Abr. 59. pl. 3.

4. A conveyance, made by a woman of her estate to trustees before marriage in trust as she should

should appoint, without the privity of her intended husband. Decreed the husband should have the possession of the estate, and that the trustees should convey it to the six clerks, subject to the further order of the court.

Vide Hunt v. Matthews,
1 Vesr. 408.

5. A widow before her second marriage assigns over the greatest part of her estate to the value of 800*l.* for the benefit of her children by her first husband. Though this was done without the consent of the second husband, yet, being to provide for the children of the first marriage, it was decreed to be good.

M. 1686, cor. M. R.
Hunt v. Matthews, 1 Vern. 408.
1 Eq. Abr. 59. pl. 5.

The second husband, having suppressed the deed of assignment, was decreed to pay 800*l.*, which was proved to be the value of the goods assigned.

6. A man marries an executrix. He shall answer for so much of the personal estate as she possessed, though he took it as a portion, and this in favour of the heir, though there were no creditors in the case.

P. 1683, cor. Jefferies, C.
Bateclor v. Bean, 2 Vern. 61.
1 Eq. Abr. 60. pl. 2.

7. Feme administratrix wastes the assets of the intestate, then marries, and dies. The husband is liable to no more than the value of the assets which came to his or his wife's hands after the intermarriage.

M. 1689, Canc.
Sanderson v. Crouch, 2 Vern. 118.
1 Eq. Abr. 60. pl. 3.

8. Where a man married a woman trader who died, and at her death was indebted for wares which she had bought, and which were by her in specie at her death, and came to the hands of her husband. Though a bill be brought against him that he may either pay for the goods or let the creditors have them again, yet he may insist he is neither executor nor administrator to his wife, and therefore not liable to her debts, and that all her goods belong to him by law. *Sed quare?*

T. 1700, Canc.
Blackmore v. Ley,
1 Eq. Abr. 60. pl. 6.
In *E. of Thomond v. E. of Suffolk*, 1 P. Wms. 469. Ld. Parker said, that though the husband in this case was not liable at law, yet he ought to be so in equity; and in *Freeman v. Goodham*, Ch. Ca. 295. Ld. Nottingham with some earnestness said, he would change the common law on this point.

9. Defendant married an administratrix to her former husband, to a share of whose personal estate plaintiff was entitled: the administratrix was likewise entitled to a third, and before her second marriage had wasted great part of the estate, and then died. Bill against the husband for an account of the estate, and satisfaction for plaintiff's share. At the Rolls an account was decreed to be taken of what had come to the hands of the administratrix before her second marriage, and for so much plaintiff to have satisfaction against

P. 1706, cor. Cowper, C.
on Appeal from the Rolls.
Petwell v. Bell,
1 Eq. Abr. 60. pl. 7.
Proc. in Ch. 255.

It did not appear in this case what the wife had in her own right, and what as administratrix, in which case, though marriage is no gift in law of the goods which she has in *auter droit*. And upon this reason only are founded all the cases where a surviving husband has been charged with his

wife's debts. *Vide* Heard and Stamford, Ca. Temp. Talb. 173. Thomond v. Suffolk, 1 P. Wms. 461.

Vide Batchelor v. Bean,

2 Vern. 61.

Saunderson v. Crouch,

2 Vern. 118.

Freeman v. Goodham,

1 Ch. Ca. 295.

If the husband in this case had made an adequate settlement on his wife without notice of her debts or devastavit, *quære* if he would have been liable, for he would then have been a purchaser of her fortune. All the subsequent cases however seem *contra* the doctrine of the principal case.

* This was a dictum of Mr. Vernon, as of counsel for the plaintiff in this case, who said he had often known it to be so held, and that one precedent in favor of a creditor was worth three to the contrary.

T. 1718, cor. Parker, C.

E. of Thomond v. E. of Suffolk,

1 P. Wms. 466. 469.

2 Eq. Abr. 234. pl. 2 & 3.

(a) In *Blackmore v. Ley*, 1 Eq. Abr. 60. pl. 6. a man married a feme sole trader, with a shop full of goods, for which she had not paid; the husband insisted on his legal right, and equity would not relieve the creditors, who were unpaid at her death.

(b) It is upon this legal ground that the courts so determine in favor of a husband.

(c) Agreeable to this resolution Id. Talbot determined the case of *Heard v. Stamford*, Ca. temp. Talb. 173.

In the Office of Executors, c. 17. s. 1. Mr. Wentworth mentions this class of cases as very hard, and proper for equity.

T. 1725, cor. King, C.

Jordon v. Foley,

Sd. Ca. in Ch. 19, 20.

2 Eq. Abr. 134. pl. 4.

defendant, so far as he had any estate of the wife; but for so much as had come to defendant's hands, or to his wife's after marriage, plaintiff to have satisfaction absolutely. The decree was affirmed by Lord Keeper.

It was said to have been several times * held, that where a man marries a woman without stipulating for any particular fortune, or making any settlement, if after the death of the wife, debts of hers appear, the husband, not being a purchaser in such case, shall be answerable for the debts of the wife in equity, as far as he had any money or other personal estate of hers.

10. A feme sole indebted by bond married and died, leaving no legal assets. Bill against the husband, who had received a great portion in a term for years, goods, money, and jewels with his wife, in consideration of which he made no settlement. It was urged, that though these were not legal assets, there was great equity that the husband should be charged, and not run away with his wife's fortune, leaving her debts unpaid (a), since he had not, by making a settlement, rendered himself a purchaser of his wife's fortune. On the other side it was urged and insisted, that the husband, *not being either executor or administrator* (b) to his wife, was not liable at law to her bonds given *dum sola*, and that, in the present instance, the husband's case was favourable to him in equity, as he paid such of his wife's debts as were disclosed to him, and advanced considerable sums for her. *Per cur.*—If defendant had been either executor or administrator to his wife, or executor *de son tort*, he would have been liable at law as far as assets. It was the plaintiff's own neglect that he did not sue on the wife's bond, and recover judgment during her life. Lord Chancellor would not, in this case, make the defendant liable to the debts of his wife contracted *dum sola* (c), but dismissed the bill with costs.

11. A woman entered into a bond, and afterwards married, having brought her husband a considerable fortune: the husband constantly paid the interest

interest of the bond during the life of the wife (a). Bill brought against the husband for payment of the bond. Resolved that the husband is only chargeable for what is sued for and recovered in the lifetime of the wife. This is the clear law of the land, and unalterable but by act of parliament; and therefore no room for equity to interpose: although the wife brought ever so large a fortune, the husband is not liable either in law or equity. Bill dismissed with costs.

12. *A.* conveyed lands to trustees for 99 years, if she should so long live, in trust to the use of herself during widowhood, and then in trust for her younger children, and afterwards married again. The children filed their bill to have possession, and the title-deed delivered up to them. The husband by his answer insisted, that the conveyance was made pending courtship, and was a fraud upon him. The court would not decree possession, because the conveyance was voluntary, but only decreed the deeds to be produced, and gave the children leave to bring an ejectment in the name of the trustees, which they did and recovered. The husband filed a cross bill, alleging, that the conveyance was made by his wife without his privity, and that she appeared to be the visible owner of the estate, which induced him to marry her; but she proved that she had publicly avowed her intention of providing for her children by her former husband, being nine in number, and who were but slenderly provided for, and that her second husband was only a lieutenant on half-pay, in low circumstances, and that she brought him a considerable sum of money, being executrix and residuary legatee to her former husband; so that it was evident there had been no fraud or imposition intended on him, as he did not so much as pretend he could make a settlement. For these reasons the Lord Chancellor dismissed the plaintiff's bill as to so much as sought to set aside the settlement made by the widow in trust for her younger children, saying it was a very reasonable thing for a widow, while it was in her power, to make a provision for her children by her former husband; and this being done before the widow's treaty of marriage with the plaintiff, and before she thought of him, it would have been impossible to ask him to be a party, and though the widow's assignment was made only to a friend, and not to a child, a

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Vide Freeman v. Goodham, 1 Ch. Ca. 295. 1 Eq. Abr. 60, pl. 5., and cited 1 P. Wms. 465., in which case the goods did not come to the husband's hands till after the death of the wife; which made the creditor's case the harder.

(a) There is no room in equity to charge the defendant from his having paid the interest; for during his wife's life he was liable both for principal and interest.

H. 1730, cor. King, C.

King v. Cotton, *Moj.* 261.

2 P. Wms. 357. 674.

2 Eq. Abr. 53 pl. 10. 131 pl. 4.

Note; The court refused to grant any injunction to stay the proceedings on this ejectment.

Note; A settlement made by a woman before marriage, without the privity of the intended husband, seems to be fraudulent, *vide Hunt v. Matthews*, 1 Vern. 408. *Howard v. Hooker*, 2 Ch. Rep. 81. *Poulson v. Wellington*, 2 P. Wms. 533. *Thomas v. Williams*, *Mof.* 177. *Lady Strathmore v. Bowes*, 2 Bro. Ch. Ca. 345. in which last case Mr. Just. Buller said, it was material to observe that the reporter in his report of the principal case adds, "for these reasons *Ld. Ch.* dismissed the plaintiff's bill, &c." for the concluding reason given by the counsel is, that there was no

fraud or imposition on the husband, who did not pretend he could make any settlement.

mere voluntary gift before a marriage treaty, in a case so circumstanced, might be binding.

H. 1735, cor. Talbot, C.
Heard & Ux. v. Stamford,
 Ca. temp. Talb. 173.
 3 P. Wms. 409.
 2 Bq. Abr. 134. pl. 3.

(a) Ld. Ch. in pronouncing his decree in this case said, it is extremely clear that by law the husband is not liable to the wife's debts, unless contracted during coverture, except where the creditor recovers judgment against the husband in the lifetime of the wife. And his lordship said, he did not see how any thing less than an act of parliament could alter this law. But the wife's choses en action are assets, and will be liable *pro tanto*. In *Freeman v. Goodham*, Ch. Rep. 295. there was some reason for the court to be provoked, when the goods themselves continued after the wife's death in the hands of the husband, who notwithstanding refused to pay for them. It is true the Ld. Ch. over-ruled the demurrer; but what was afterwards done in the cause does not appear (1). Neither in *Powell v. Bell*, Prec. in Ch. 256 (2). does it appear that any notice is taken of what estate the wife had in her own right, and what as administratrix of her husband. His lordship said, if he relieved against the husband because he had a sufficient portion with the wife, he ought by the same reason to relieve a husband against whom a creditor had recovered judgment where he had no portion with his wife. If the law as it now stands be inconvenient, it will be a good reason for the legislature to alter it (3); but till that is done, equity cannot interpose, and the present law must take place. The next day the case of *Thomond v. Suffolk*, in 1718, 1 P. Wms. 466., was cited and insisted on in point, on the authority of which case Ld. Talbot made his decree as before stated. *Note*; *Jordon v. Foley*, Sel. Ca. in Ch. 19, 20. was determined by Ld. King in 1725 on the same principle.

(1) The event of this cause does appear in the Register Book; it is the case of *Freeman v. Goodland*: the defendant (in that case) married the testator's widow, who had bought goods of the testator's executors. After the widow's death the executors bring their bill (*int. al.*) to be satisfied for these goods: defendant demurred, and the demurrer was over-ruled, 18 Dec. 1676. At the hearing of the cause, 2 Dec. 1678, the defendant insisted that the wife had a property in these goods at the marriage, and that they were part of her portion. Yet, to avoid trouble, (though he contended he was not liable,) he offered to pay for the goods on having an assignment made to him of some leasehold estates mentioned in the cause; and the decretal order runs, "that the defendant *Goodland* do pay to the said executors the sum of 350 l. reported due to them on account of the said goods, according to his offer aforesaid." This being a decree in consequence of the defendant's offer, the point was not determined in this case: perhaps the defendant not liking the appearance of his case, on arguing the demurrer, was induced to make the offer mentioned.

(2) This seems to be the only case which is contradictory to the present point; though Mr. Vernon, of counsel for the plaintiff in this cause said, he had often known it to be so held; and that one precedent in favour of a creditor was worth three to the contrary.

(3) Notwithstanding the earnestness with which Lord Nottingham declared *he would alter the common law on this point*, being dissatisfied in the cause of *Freeman v. Goodland*, and the dissatisfaction Mr. Wentworth expresses in his Office of Executors, c. 17. s. 1., the legislature does not yet see that it is a law grievous enough to be altered: for it still remains in *statu quo*, unchanged by any parliamentary interposition.

2 Mar. 1737, cor. Hardw. C.
Newstead and others v. Searles and others, 1 Atk. 265.

13. A woman indebted *dum solâ*, marries, and brings a portion to her husband, and dies. Equity will not help the creditors against the husband to the value of what he received with his wife (a).

So, on the other hand, where a woman indebted *dum solâ* marries, and brings no portion to her husband, and a creditor of the wife, when sole, recovers judgment against him in her lifetime for the debt, and then the wife dies; equity will not relieve the husband against the judgment.

So, on the other hand, where a woman indebted *dum solâ* marries, and brings no portion to her husband, and a creditor of the wife, when sole, recovers judgment against him in her lifetime for the debt, and then the wife dies; equity will not relieve the husband against the judgment.

14. A widow had two children by a former husband, and no provision made for them, and these two children had each of them a child; and being in possession in her own right of freehold, copyhold, and leasehold estates, by articles before her second marriage, to which her husband was a party, and by his consent conveys the whole to trustees, that they may divide the freehold, copyhold, and leasehold, if no issue of the marriage, in moieties, one to the plaintiff her grandson, his heirs and

and assigns, the other to her grand-daughter in fee; provided, if there should be any child or children of the marriage, that child or children to have an equal share of the said estates with the grandson and grand-daughter. The husband and wife afterwards mortgaged the settled estates to persons who had notice of the settlement. The settlement held to be no voluntary agreement, but a binding one; and said by the court—There was no instance where such a limitation has been held fraudulent and void against subsequent purchasers or creditors; for if it should, no widow on her second marriage would be able to make any certain provision for the issue of a former marriage.

The statutes 13 and 27 Eliz. declare, voluntary conveyances made against purchasers for a valuable consideration or *bona fide* creditors to be fraudulent.

In *Jenkins v. Kemish*, Hardr. 395. Lev. 150. 237. Ch. Ca. 105. Gilb. Ch. Rep. 275. it is held, that in a marriage settlement not only the husband, who is tenant for life, and the issue of the marriage, but a remote remainder-man shall be looked upon as a purchaser under the marriage settlement, because all the contractors equally agreed to let in his interest, and the contract is meritorious, and therefore shall stand good to every person interested in the contract.

15. A commission of bankrupt having issued against a married woman, on a trading and act of bankruptcy before marriage, superseded (on the ground of her marriage) as illegal.

M. 1787, cor. Thurlow, C.

Ex parte Mear & Ux.

2 Bro. Ch. Ca. 266.

The creditors of the wife became the creditors of the husband by the marriage, therefore a commission cannot be supported against a feme covert.

16. Lady S. filed a bill, whereby she set forth, that being entitled to an estate for life in divers lands, &c. and being about to marry one Grey, she, with his consent, and for the purpose of providing for her children, conveyed by indentures, dated 9th and 10th of January 1777, her estates to trustees, in trust to pay the rents and profits during her life, to such uses as she, whether sole or covert, should appoint, and that she made an assignment of her personal estate to the same uses; that afterwards (in fact within a week of the date of the said conveyance) she married the defendant one Bowes, who, after his marriage, by force compelled her to revoke the uses of her former deed. She therefore prayed that the said deed might be established; that the instrument of revocation might be delivered up to be cancelled; that Bowes might be dispossessed of the estates, and that he and his agents might be restrained from receiving the rents. Bowes by his answer swore, that he had no notice of the settlement of the 9th and 10th January 1777 before his marriage. He also filed a cross bill, praying that the said settlement might be set aside as fraudulent, being executed by his wife before marriage without his knowledge, and in derogation of his marital rights; and that the deed of revocation might be established. The fact that the deed of revocation was extorted by force having been established by a verdict at law, the only

T. 1783, cor. Buller, J. abf. C.

Lady Strathmore v. Bowes.

2 Bro. Ch. Ca. 345.

1 Eq. Abr. 59. 3 Veq. jun. 28.

Vide Carleton v. E. of Dorset,
 8 Vern. 17. and Edmonds v.
 Donnington, there cited. King
 v. Cotton, 2. P. Wms. 674.

question remaining was, whether the wife's settlement of 9th and 10th January 1777 should be delivered up to be cancelled according to the prayer of *Bowes's* bill? *Per Buller, J.*, sitting for Lord *Thurlow*.—The cases on this point may be divided into two classes: 1st, Those relating to women who never married, and who of course had no children; 2d, Those relating to women who had children by a former husband. The cases of the first class decide that if the wife holds out, that the husband will be entitled on the marriage to her property; the deed is void: but they go no farther. If such deeds were universally void, the other class of cases could not have existed; for children could make no difference if they are good in any case; to avoid them, the party must shew to the court that the husband has been deceived: mere concealment is not enough. Again; *Bowes* the plaintiff here seeks equity, he must therefore do equity. He demands to have this deed set aside without offering to make any provision for his wife: this is a ground for refusing relief. In all cases where a husband comes here for his wife's fortune, he must make a settlement. Decree therefore, that the deeds of 9th and 10th January 1777 be established, and an account of rents and profits against *Bowes* from the filing of the bill.

§. C. 3 Mar. 1789, cor. Thurl. C.

The law conveys the marital rights to the husband because it charges him with all the burthens, which are the consideration he pays for them; therefore it is a right upon which a fraud may be committed. Out of this arises a rule of law, that the husband shall not be cheated on account of his consideration.

S. C. A conveyance by a woman under any circumstances, and even the moment before marriage, is good *prima facie*, and bad only if there be fraud; as where made pending the treaty without notice.

1 July 1793, cor. Loughb. C.

Ball v. Montgomery,

2 Ves. jun. 194.

Vide Strathmore v. Bowes,

3 Bro. Ch. Ca. 345. 1 Ves jun. 23. 28.

17. If a woman conveys her property before marriage without the privity of the intended husband, it is fraudulent, and will be set aside.

Sec. 6. How far the Husband shall be bound by the Acts, or answerable for the Defaults of the Wife, and by his own Covenants on her Behalf: And herein of the Acts or Engagements of the Wife generally in Cases where she cannot be considered a Feme Sole.

1. **FEME** covert trades by her husband's consent, and gives bills for money, and he receives the profits of her trade. If she dies, and leaves a stock to her husband, he shall be answerable for debts contracted in the trade. In this case the suit was against the husband, after the wife's death, for 100*l.* borrowed by the wife, and an issue was directed to try if it was borrowed for carrying on the trade; for if it was, the husband shall be decreed to pay it.

P. 1697, cor. M. R.

Bowyer v. Peake,

2 *Freem.* 215. 2 *Eq. Abr.* 133. c. 16

A feme covert is not under a total disability to contract; but if the husband be assenting, it is obligatory. If a woman seals a bond in the presence of the husband, and he stands by and doth not gainsay, it shall bind, which, his Honour said, he believed might be taken out of the Book of Numbers, where it is said, if the husband be present and doth not gainsay, it shall bind.

2. A feme covert, heir at law, and her husband, (not consant of their right,) being drawn in to execute articles for supplying the defects of a surrender of copyhold lands to the use of a will, whereby they were devised to the plaintiff. Master of the Rolls would not decree the articles of a feme covert for conveying her inheritance to be carried into execution, but dismissed the bill, and left the plaintiff to his remedy at law; and on appeal, *Somers, C. S.* affirmed the decree upon the ground of the fraud, without regarding the inheritance of the wife.

T. 1697, cor. *Somers, C. S.*

Proffen & Ux. v. Wasley & Ux.

Prec. in Ch. 76.

2 *Eq. Abr.* 55. pl. 1.

Vide Young v. Clark, Prec.

in Ch. 538. *Hicks v. Phillips,*

Prec. in Ch. 575. *Seagood v.*

Meale, Prec. in Ch. 560. *Savage*

v. Taylor, Ca. temp. Talb. 234.

236. *Wooley v. Bryan, 2 Bro.*

P. C. 387. 4 *Vin. Abr.* 57. pl. 19.

Carol v. Chamberlain, 14 July

1721. *Gro. & Rud. of Law &*

Eq. 17 *Ca.* 8, 9. *Toppe v. Stan-*

hope, 2 Bro. P. C. 183. 5 *Vin.*

Cole v. Gibbons, 3 P. Wms. 290.

3. Although the husband by law cannot be charged with the debts of the wife after her decease, unless judgment be obtained in her lifetime, yet, where the wife brought the husband a sufficient estate, this court will make him answerable after her death.

M. 1698, *Canc.*

Ball v. Smith,

2 *Freem.* 231.

4. Bill to compel the defendant and his wife to join in a fine to the plaintiff, pursuant to his covenant, in a conveyance. The defendant and his wife, and *H.* their son and heir, set forth in their answer, that defendant *H.* is tenant for life, remainder to his wife for life, remainder to the heirs of the husband by his wife, remainder to the husband's

M. 1715, cor. *Cowper, C.*

Barrington v. Horn & al.

5 *Vin. Abr.* 547. pl. 35.

2 *Eq. Abr.* 17. pl. 7.

The husband and wife were parties to the deed, but the husband only sealed it, though the covenant was, that the husband and wife should levy a fine, and a fine *sur censant de droit*, &c. was levied by the husband alone.

P. 1717, cor. Cowper, C.
Bagot v. Oughton, 1 P. Wms. 348.
Forfeik. 332. *Mod.* 247. 381.

(a) *Vide Evelyn v. Evelyn*,
2 P. Wms. 659. *Howell and Price*, 1 P. Wms. 294. (n.)

Vide Tate v. Austen, 1 P. Wms. 264. *Lewis v. Nangle*,
Ambl. 150. *Clinton v. Hooper*,
3 Bro. Ch. Ca. 201.

T. 1718, cor. Parker, C.
E. of Thomond v. E. of Suffolk,
1 P. Wms. 466.
2 Eq. Abr. 567. pl. 1.

M. 1718, cor. Cowper, C.
Ortred or Outram v. Round,
4 Vin. Abr. 203. pl. 4.
2 Eq. Abr. 145. pl. 4.
Ld. Cowper in this case said,
it is a great breach upon the wisdom of the law to compel a husband to procure his wife to levy a fine and force her to part with her land without her consent.

Vide Barrington v. Horn, 2 Eq. Abr. 17. pl. 7. where a specific performance was decreed, and *Hail v. Hardy*, 3 P. Wms. 189. *S. P.* and *Winter v. Devereux* there cited.

M. 1718, cor. M. R.
Harris v. Lee, 1 P. Wms. 482.
Preced. in Ch. 502.

husband's heirs; and insist that nothing passed by the conveyance but an estate for life of the husband, and that the wife did not seal the deed. Decreed, that the husband should procure his wife to join with him in a fine to the plaintiff according to his covenant, since he has taken upon him to do it, and the plaintiff hath paid the full value of the estate.

5. Where a feme sole seised of land subject to a mortgage marries B., and B. covenants in an assignment of the mortgage to pay the money, his personal estate is not liable unless he has received the money; forasmuch as the debt (a) being the wife's father's (by whom the estate was mortgaged), the nature of that debt was not altered by the husband's covenant, which can only be considered as an additional security to the mortgagee.

From hence it may be inferred, that if a feme sole makes a mortgage, and receives the money and marries, and upon a transfer of that mortgage the husband covenants to pay the money, his personal estate shall not be applied to pay the mortgage-money in aid of the wife or her heir. *Secus*, if the husband had received the money.

6. A husband is liable for all the wife's debts during coverture, though he had no portion with her; but not unless sued during the coverture.

7. Husband and wife, for a valuable consideration by lease and release, conveyed the wife's land in fee, and covenanted that the wife should levy a fine of the same to the use of the purchaser; she refused to levy a fine. Plaintiff brought his bill to have his title perfected by a specific performance of the covenant, and a precedent was cited where a specific performance had been decreed in the like case; but Lord Chancellor would not decree a specific performance in this case, because, upon such a decree, the husband could not compel his wife to levy a fine; and if she would not comply, imprisonment would fall upon the husband for contempt, which was the ill consequence of the decree in the cited case. His lordship therefore directed the defendant to refund the purchase-money with costs.

8. Baron gives feme the foul distemper; A. lends the wife 30*l.* to pay for her cure. Baron devises

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devises lands for payment of his debts. This 30*l.* is the husband's debt, and *A.* is a creditor in the doctor's place.

Though a wife cannot at law borrow money even for necessities so as to bind the husband, yet, if money is applied to the wife's use for necessities, the lender shall in equity stand in the place of him who supplied the necessities.

9. Plaintiff was servant to defendant's wife Mrs. *B.*, who lived separated from her husband, and passed for a widow. Plaintiff knew nothing to the contrary: plaintiff in her service had saved 50*l.* Application was made to Mrs. *B.* by one *C.* (who was also a defendant) to borrow 100*l.* on mortgage; Mrs. *B.* said she had only 50*l.* of her own, but would get the other 50*l.* of a young woman. Accordingly she got together the whole 100*l.*, and directed the mortgage to be made out to her by the name of *P.*, her maiden name, though she went also sometimes by the name of *T.*, her first husband. The mortgage was made accordingly, and soon after she gave plaintiff her bond for her 50*l.* and interest by the name of *T.* *C.* made several payments of interest to Mrs. *B.*, knowing nothing of her marriage. Some time after, Mr. *B.* the husband having notice of this, got all the mortgage-writings into his custody, and then Mrs. *B.* obtained a sentence of divorce. On discovery of the marriage, plaintiff brought her bill against the husband and wife and *C.* to charge her 50*l.*, either upon the mortgage, or the person of the husband. The wife put in a separate answer, wherein she disclosed all the matter before mentioned. *C.* by his answer confessed as set forth; and moreover, that Mrs. *B.* lately told him plaintiff was the young woman of whom she had the 50*l.* The husband insisted upon his title at law to this mortgage, and said he believed the whole was a contrivance. Plaintiff examined *C.* by order of court as a witness, and his testimony was the same as his answer, which was nothing more than what he had heard the wife say; so that, in fact, his testimony was that of the wife. *Per cur.*—The wife shall never be admitted as evidence to charge her husband. But Master of the Rolls said, this was a new case; for Mrs. *B.* had transacted this affair as a feme sole, and neither plaintiff nor defendant *C.* knew of the marriage, and it had appeared that the husband

2 *Eq. Abr.* 135. c. 2. (a).
Vide Marlow v. Pitfield, 1 P.
 Wms. 559. 1 Mod. 129. 1 Raym.
 444. 1 Salk. 387. 4 Burr. 2177.
 (a) Decree affirmed per Maccluf-
 field C. upon appeal from the Rolls.

H. 1719, cor. M. R.
Rutter v. Baldwin,
 1 *Eq. Abr.* 226. pl. 15.

band upon some occasions countenanced a concealment of the marriage, the court therefore allowed of the wife's evidence as supported by C., and thought it sufficient to prove that 50*l.* belonged to plaintiff. Decreed plaintiff the 50*l.* and her costs.

T. 1725, cor. King, C.
Christmas v. Christmas,
 Sel. Ca. in Cb. 20.
 2 Eq. Abr. 152. pl. 16.

* The word *executed* is not in the original.

10. *A.* having lands and a personal estate, before her marriage, conveys all her estate to her separate use, to which the intended husband was a party; and he covenanted that he would not interfere with it. On this estate there was a mortgage for 300*l.*, which before these conveyances (executed *) he verbally promised to discharge. During the coverture the mortgage was assigned over, and he covenanted thus, that I, or my wife shall pay it. The husband and wife lived with great affection together, and he constantly received all the profits of this separate estate. He died, having never paid off the mortgage, leaving fortunes to children which he had by a former *venter*. These the wife maintained after his decease. She brings her bill, 1st, that her husband's effects should be applied to the redemption of the mortgage; 2dly, to have an account of the profits of her separate estate received by the baron; 3dly, to have an allowance for the maintenance of his children after his decease. Decreed, that the husband's effects should not be charged to redeem the mortgage, nor be accountable for the profits of her separate estate received by him; and that the maintenance should be counterbalanced by the interest of their fortunes. On a rehearing, King, C. said, that there is no foundation to charge the husband with the payment of the mortgage, for by the statute of frauds it is not a charge unless reduced into writing. All is at an end when there is an agreement in writing; all the conversation was only a previous step. This is the ultimate settlement of the whole affair, on mature consideration of every thing, as between him and the mortgagee he might be charged, but not by the wife. As to the receipt of the separate maintenance, if they lived together amicably, it shall be looked upon as done by the wife's consent. As to the maintenance, she has taken it upon herself, and it doth not appear but the interest is sufficient for that purpose. Decree affirmed.

H. 1727, cor. King, C.
Evans v. Evans, 2 P. Wms. 451.

11. A feme covert cannot bind herself by her answer, much less her husband, as to her inheritance.

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12. A feme covert was permitted to change her *prochien amy* after a considerable progress in the cause, the new one entering into a recognizance to answer the costs, and abide the order on hearing.

M. 1731, in Scacc.
Lady Lowley alias Halpen v. Halpen, Bumb. 310.

13. Where the husband for a valuable consideration covenants that his wife shall join with him in a fine of the wife's freehold estate, equity will enforce a performance of such covenant.

T. 1733, cor. Jekyll, M. R.
Hall v. Hardy, 3 P. Wms. 189.
2 Eq. Abr. 28. pl. 35.
Equity enforces the performance of such a covenant under a presumption that the husband, before he covenanted, had obtained his wife's consent.

But if it can be made appear to have been impossible for the husband to procure the concurrence of his wife, (as suppose there are differences between them), and the husband offers to return all the money with interest and costs, *quære*, if under these circumstances the husband would not be excused?

3 P. Wms. 189. n.
Winter v. Devreux,
T. 1723, cor. M. R.
Vide Barrington and Horse,
2 Eq. Abr. 17. pl. 7. S. P.
Ortied and Round, 4 Vin. Abr. 203. pl. 4.

14. A promise by the wife to release during coverture does not bind a wife; but, if repeated after the husband's death, it is a confirmation of it, and good.

20 Feb. 1741, cor. Hardw. C.
Smith & Ux. v. French,
2 Atk. 245.
So an infant may bind himself to a contract by confirming it after he comes of age.

15. Coverture is no excuse for not redeeming a mortgage; for if a woman becomes afterwards discover, the statute of limitations will run from that time, even though she should marry again.

2 July 1742, cor. Hardw. C.
Anon, 2 Atk. 333.

16. A feme covert who had a separate estate employed workmen in her husband's house, without his directions, and promised to pay them. The Master of the Rolls doubted whether a parol promise can subject lands; but she submitting to pay, he decreed accordingly.

28 July 1742, cor. M. R.
Clerk and others v. Miller,
2 Atk. 379.

17. A husband was decreed to join, and also to procure his wife to join in a conveyance of her estate, pursuant to agreement, or to refund a sum received by the husband; but the court would not make a personal decree on the wife.

22 Nov. 1750, cor. M. R.
Sedgewicks v. Hargrave,
2 Vef. 57.

How far the husband's estate shall be liable to an account for the produce of his wife's estate received by him during the coverture, see *ante*, f. 1.

As to those cases where a wife shall be considered a feme sole, with respect to her separate estate acquired after marriage, and during cohabitation, and shall dispose thereof accordingly, see *ante*, f. 4.

In

In what cases a wife's estate shall be bound by the acts in which she has joined her husband, or by her appointment in his favour, see *post*, §. 7.

Of the debts and engagements of the wife after separation, see §. 13.

Of a feme covert sole trader, see *Bankrupt, London, Customs, Trade*.

Of a feme covert executrix or administratrix, see *Executors and Administrators*.

Sec. 7. Of the Wife's private Examination and Consent to part with her Personal Estate (in Analogy to a Fine at Law). How far she is bound by the Acts in which she joins her Husband, or by an Appointment of her separate Estate in his Favour: And herein of the Intervention of her Trustees.

P. 1682, Canc.
Reason v. Sacheverell,
1 Vern. 41. 2 Cb. Rep. 98.
1 Eq. Abr. 62. pl. 3. 324. pl. 2.

1. IF baron and feme levy a fine of the wife's land, to enable them to take up 400*l.*, and they make a mortgage for it, and after the mortgage is forfeited the husband pay off part of the mortgage-money, but afterwards borrows of the mortgagee as much more of the money: the mortgagee having the legal estate in him, by the forfeiture shall hold against the heir of the wife until the whole is paid; and if the heir will not redeem he must be foreclosed.

H. 1683, cor. North, C. S.
Brend v. Brend, 1 Vern. 214.
1 Eq. Abr. 62. pl. 6. 316. pl. 8.

2. A jointress of houses burnt down, joins with her husband in a fine *sur concessit* for 99 years (if she should live so long) for securing 1500*l.* to J. S. J. S. re-demises to the husband, reserving the equity of redemption to the husband and his heirs. The husband lays out 3000*l.* in re-building the houses, and dies. Decreed the wife and not the heir of the husband should redeem, she having a reversion in her which attracted the redemption, and was no party to the re-demise by which the equity of redemption was reserved to the husband.

P. 1688, Canc.
Baker v. Child, 2 Vern. 61.
1 Eq. Abr. 25. pl. 6. 62. pl. 2.

3. Where a feme covert agrees to join with her husband in making a surrender, or levying a fine, and

and he dies before it is done, equity will compel her by decree (a) to perform the agreement.

this case; but it was by consent referred to the arbitration of Mr. Serjeant Rawlinson. Dict. per Mr. Murray, in *Thayer v. Gould*, in Cans. M. 13 G. 2.

4. A feme covert agrees to sell her inheritance, so as she may have 200*l.* secured to her. The land is sold, and her 200*l.* put out in trustees names. This money not liable to the husband's debts, though the wife afterwards agreed it should be so.

T. 1688, cor. Jefferies, C.
Rutland v. Molincux, 2 Vern. 64.
1 Eq. Abr. 63. pl. 7.

5. A wife joins with her husband in a mortgage for years of her own inheritance, in order to raise money to buy him a place; and the husband covenants in the mortgage to pay the money (a). He accordingly pays the money, and takes an assignment of the mortgage in trust for himself, and devises the mortgage term (b) for the benefit of his younger children; but on behalf of the eldest son and heir, the premises were held to be discharged from any demands by the younger children; and that the term should be assigned as he should direct.

12 Jan. 1703, Dom. Proc.
Ld. Huntingdon v. Lady Huntingdon & al. 1 Bro. P. C. 1.
2 Vern. 437. 1 Eq. Abr. 62. c. 4.
4 Vin. 69. c. 9. 10 Vin. 345. c. 17.

(a) Mr. Vernon says, "pro-
"viso that on payment thereof
"the term to cease,"

(b) "And by will gives it to a
"second wife." Per Vern.

The decree in Chancery was,
that the heir should redeem, which
decree was here reversed by the
Lords.

Note; It was insisted in this
case that it was a gift of so much

money from the wife to the husband, and therefore ought not to be refunded *Vide Tate v. Austen*, 1 P. Wms. 266. & *vide Pocock v. Lee*, 2 Vern. 604. *Baggot v. Oughton*, 1 P. Wms. 347. *Evelyn v. Evelyn*, 2 P. Wms. 659. *Lewis v. Nangle*, Amb. 150. & 2 P. Wms. 664. (n.) *Earl of Kinnoull v. Money*, cited 3 Bro. Ch. Ca. 206. *Clinton v. Hooper*, 3 Bro. Ch. Ca. 201. *Parteriche v. Powlett*, 2 Atk. 384. *Lacem v. Mertins*, 1 Vef. 313.

6. A. on the marriage of his son B. settles land to the use of B. for life, remainder to the wife for life, remainder to the heirs of their two bodies, remainder to B. in fee. B. and his wife, by deed and fine, mortgage in fee, and (subject to the mortgage) the lands are settled to the use of B. for life, and after his and his wife's death, to her heirs by him begotten, remainder to his right heirs. The wife after her husband's death suffers a common recovery. The question was, whether the estate of the wife for her life by the first settlement, and the limitation to the heirs of her body by the second, did consolidate? And if it did, whether the estate of the wife was alienable within the statute of 11 H. 7. ? (a)

H. 1704, cor. Wright, C. S.
Clifton v. Jackson, 2 Vern. 486.

(a) Ld. Keeper thought that
a trust or equity of redemption
was within 11 H. 7. which ex-
pressly extends to uses. But if
the statute were penal, as the
statute of Gloucester, equity will
not aid the heir.

His lordship doubted whether
the estates did not consolidate,
though by several deeds. The
authorities cited are only in the
affirmative, that if by the same
deed it shall consolidate, not ne-
gatively, that if by different
deeds they should not; and in
Pybus v. Mitford, 2 Lev. 75.
there was no express estate for life
limited but ariseth by implica-
tion, and there held that the estate was consolidated. *Sed cur. advisare vult.*

7. A. and his wife mortgage the wife's estate, and A. covenants to pay the money, but the equity of redemption is reserved to them and their heirs. A. dies, and his wife survives. The mortgage shall be discharged out of the husband's personal estate,

H. 1707, Canc.
Pocock v. Lee, 2 Vern. 604.
1 Eq. Abr. 317. pl. 11.
Vide Lord and Lady Hunting-
don's case in Domo Proc. 1 Bro.
P. C. 1.

and not remain a charge on the wife's land, for the husband having had the money, it is his debt, and the land is only to be considered as an additional security.

M. 1714, cor. Cowper, C.

Tate v. Austen, 2 Vern. 689.

1 P. Wms. 264.

1 Eq. Abr. 62. pl. 5.

In P. Wms.'s report of this case it is said, that the husband by will gives charity legacies to the amount of his personal estate. The wife's mortgage shall be paid out of the husband's assets in defeat (1) of the charity legacies, for they are still but legacies; but the husband's debts, even by simple contract, shall be preferred to the mortgage (2). Every thing is to be taken favourably for the wife, who, for supplying her husband's occasions, charged her land with his debt (3); and here Lord Chancellor put the counsel in mind of Lord Huntingdon's case, 2 Vern. 437.

(1) *Vide Masters v. Masters*, 1 P. Wms. 421. and *Attorney-General v. Hudson*, 1 P. Wms. 675. where charity legacies abated in proportion with other legacies on a deficiency of assets.—*Sic* in *Attorney-General v. Robinson*, 2 P. Wms. 25.

(2) Yet it is said in *Robinson v. Ger*, 1 Vef. 252. that if the mortgagee had received satisfaction out of the personal estate of the husband, the creditors of the husband would not stand in the place of the mortgagee as against the real estate of the wife.

(3) *Vide* also *Pocock v. Lee*, 2 Vern. 604. *Bagot v. Oughton*, 1 P. Wms. 347. *Evelyn v. Evelyn*, 2 P. Wms. 659. *Lewis v. Nangle*, Amb. 150. & 2 P. Wms. 664. (n.) *Earl of Kinnoul v. Money*, cited 3 Bro. Ch. Ca. 206. *Clinton v. Hooper*, 3 Bro. Ch. Ca. 201. *Parteriche v. Powlett*, 2 Atk. 384. *Lacam v. Mertins*, 1 Vef. 313.

T. 1718, cor. Cowper, C.

Butler v. Duncomb, 2 Vern. 762.

1 P. Wms. 448. and 1 Eq.

Abr. 339. pl. 6. S. C. but nothing is there said (except by note) of Mr. Butler's application for half of his wife's portion, nor of her consent that he should have it.

M. 1721, cor. M. R.

Middleton v. Ld. Onslow & al.

1 P. Wms. 768.

2 Eq. Abr. 254. pl. 3. 259. pl. 2.

(a) *Vide Spurrett v. Spiller*, 1 Atk. 105. *E. of Chesterfield v. Jansen*, 2 Vef. 156. *Cockshott v. Bennett*, 2 Term Rep. 763.

P. 1723, cor. M. R.

Drybutter v. Bartholomew,

2 P. Wms. 127.

2 Eq. Abr. 132. pl. 4. 473. pl. 3.

(a) Fines and recoveries of New River shares must be levied and suffered in the three counties through which the river runs.

8. The wife joins with her husband in a fine to raise 400 l. by mortgage of her own estate, to buy him a place. Husband dies. The mortgage shall be paid out of his personal estate if there are assets to pay his other debts.

The wife's mortgage shall be paid out of the husband's assets in defeat (1) of the charity legacies, for they are still but legacies; but the husband's debts, even by simple contract, shall be preferred to the mortgage (2). Every thing is to be taken favourably for the wife, who, for supplying her husband's occasions, charged her land with his debt (3); and here Lord Chancellor put the counsel in mind of Lord Huntingdon's case, 2 Vern. 437.

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9. A woman being entitled to a portion of 4000 l. after the death of her mother, and no interest being payable for it in the mean time, and she having married a considerable tradesman, it was decreed by the wife's consent, that the husband might sell or dispose of the wife's portion as he thought fit.

10. A wife consents (in court) that her trustees should apply 500 l., part of her portion, to compound with her husband's creditors, and the court accordingly orders the same to be paid to the creditors thus consenting to discharge him, but some of the creditors took private notes from the husband before they would execute the deed of composition. Decreed, that such partial securities be set aside, and delivered up to the husband (a).

11. Baron in right of his wife seised in fee of a share of the New River water. Baron and feme make a mortgage by demise for 1000 years, at a pepper-corn rent, without levying a fine. The husband died. The wife received the profits, and continued to pay the interest. The mortgagee brought his bill to foreclose the wife. *Per cur.*—A fine may be levied of New River shares (a), and there ought to have been a fine in this case, as it was the wife's inheritance. If there had been a
rent

rent reserved, the acceptance of such rent by the wife when discoverd would have affirmed the lease; but here is no acceptance, and the lease is of an incorporeal thing, out of which rent could not be well reserved; wherefore the lease expiring by the death of the husband, the mortgage is determined, and nothing is left to foreclose (a). Bill dismissed.

the deed. In *Clinton v. Hooper*, 3 Bro. Ch. Ca. 201. it was said in argument by Mr. Mansfield, that the case of *Goodright v. Straphan* has been always doubted, and is contrary to *Drybutter v. Bartholomew*.

12. Lord B. being seised in fee (in right of his wife) of certain lands in *Essex*, he and his lady demised same to G. G. for 21 years, at a rent of 8 l. 15 s. *per annum*. Lord B. covenanted for quiet enjoyment, and that if G. G. and E. his wife, or either of them, should be living at the end of the term, and should desire a new lease for a further term, then that Lord B. and his lady, or the survivor, should upon request grant a new lease at same rent, and under same covenants. G. G. died, leaving his wife E. executrix, who proved his will, and survived the expiration of the term. F. purchased the reversion in fee of the premises, and sold them to defendant, who had notice of Lord B.'s covenant to renew. Plaintiff was administratrix to E. the widow of G. G., with her will annexed, and administratrix *de bonis non* of G. G. Bill for a further lease of 21 years according to the covenant: Decreed accordingly *per* Master of the Rolls, and affirmed *per* Lord Chancellor.

13. A lease for years was assigned to trustees before marriage, in trust to make leases for the benefit of husband and wife. After marriage baron and feme assign to S. in consideration of building the premises, S. assigns to A. for a valuable consideration. The feme was concluded, though no fine levied. The trustees were not parties, though if they had they would have been decreed to execute the trust pursuant to the assignment of *cestuy que trusts*.

14. Articles of agreement between husband and wife are binding in equity without the intervention of trustees.

15. A purchase is made to the use of baron and feme and their heirs, and baron and feme join in a mortgage to the vendor to secure part of the purchase.

(a) In *Goodright v. Straphan*, Cowp. 201. there was a mortgage for years by baron and feme, of the feme's inheritance, without a fine. On ejectment brought by the wife surviving against the mortgagee in possession, circumstances of confirmation by the wife when discoverd were holden to be a defence in the ejectment, though there was no actual redelivery of

H. 1724, cor. Talbot, C.

Winged v. Lefebury,

2 Eq. Abr. 32. pl. 43.

Ld. C. thought that the defendant having notice, had put himself in Ld. B.'s place, who was certainly bound by his covenant; and that where a man agrees to sell at a certain day, and one party dies before that sale, though an action will not lie against the heir, yet the articles are a lien upon the land. It is a purchase in equity, and the purchaser is entitled to the estate, and the other is a creditor for the money.

P. 1724, in Scacc.

Roupe v. Atkinson, Bunb. 162.

2 Eq. Abr. 136. (n.)

Note; S. & A. filed a cross bill to be quieted in the possession, and for an injunction, which was decreed. It did not appear that S. ever had notice of the settlement; but if he had, Eyre, C. B. said he should have been of the same opinion.

H. 1725, in Scacc.

Sir Cleave Moore v. Freeman & al.
Bunb. 205.

M. 1729, cor. King, C.

Anon. Mos. 248.

chafe-money. The mortgagee files a bill of foreclosure; baron and feme answer jointly; the baron dies, and the wife moves to amend her answer, and insists that the mortgage did not bind her for want of a fine. But the motion was denied, because an answer is equal to a fine, and the mortgage is good in equity, the wife not pretending she was imposed on.

T. 1734, cor. Talbot, C.
Halley v. Badham,
 2 Eq. Abr. 154. pl. 19.
 Vin. Abr. tit. Baron and Feme,
 (E. a. 7), ca. 12.

16. *A.* by his will gave two legacies to his daughter *B.* of 500*l.* each, one of them for *her sole and separate use, she being married without a settlement.* A decree was obtained for placing out *these legacies for B.'s benefit.* *B.'s* husband, upon petition to Lord Chancellor Macclesfield, obtained an order (*his wife consenting*) for one 500*l.*, and the other 500*l.* *by consent, to be laid out for the separate use of the wife; the husband and wife (she being nineteen) join in an assignment of the last 500*l.* to secure a debt to D., and the husband becomes a bankrupt.* *D.* brought a bill against the assignees under the commission, and also against the husband and wife, and Lord King decreed the assignment good, and the residue to be paid to the assignees. The wife rehears, alleging that she was poor, and not able to produce the order of Lord Macclesfield. Objected, that the order was voluntary, and did not bind creditors. Objected also, that the assignment was good, it being of her separate estate, though under twenty-one; and that *infants may execute a power by an attorney.* Lord Chancellor—As to the objection, that the order was voluntary, and did not bind creditors, he said, that is a hard censure on the proceedings of this court, and such settlements are usual practice, and this present one is according to the will. Where the husband makes a voluntary provision for the wife, to take place after his death, it has been adjudged fraudulent, but *here it is set apart immediately.* As to the assignment itself, he admitted that *if the feme had been sole, it had not been good; but the case is stronger, because she was a feme covert; and though in cases of mere powers or authorities infants may execute, because nothing moves from them, yet this is an interest, and can no more be departed with in equity by an infant, than by an infant's assignment of a legal estate at law.* Decree varied.

M. 1734, cor. Talbot, C.
Penne v. Peacock,
 Ca. temp. Talb. 41.

17. A feme before her marriage with *A.* conveyed (*with A.'s privity*) lands to trustees in trust,

to pay the rents and profits to her sole and separate use for her life; and after her decease, to such uses as she, whether sole or covert, should by her last will limit and appoint; and for want of such appointment, then to her own right heirs for ever. After the marriage *A.* mortgaged part of the lands to *B.* (the plaintiff) for 1000 *l.* for a term of 500 years, and then a fine is levied by *A.* and wife, who both declared the uses, as to the mortgaged premises, to be to the plaintiff for securing the principal and interest. The wife by order of the court answered separately, and insisted, that she was forced by duress to join in the fine; and that the mortgage was fictitious, and in trust for her husband in order to defraud her: that there was no power reserved to her in the indenture of bargain and sale to dispose of her real estate, or any part thereof, but by her last will: that she had no estate in the premises, but that the fine and mortgage were both void. It was argued, that the legal estate being in trustees, the parties to the fine had not such an estate in them whereof a fine could be levied to bar the wife's right; and that this being a mere *naked power*, without any interest, could not be barred by the fine, but remained still in the wife by force of the trust-deed. But Lord Chancellor Talbot decreed the trustees to convey to the plaintiff the mortgagee.

destroyed by the fine; since that a lease and release, or any other conveyance, will carry with them all powers that are joined to the estate. So a feoffment to the use of her last will, or surrender of a copyhold to the use of one's last will, does still leave a power in the feoffor or surrenderor to dispose of their estate by a new feoffment or surrender. Decreed as above, but without prejudice to any future bill that may be brought for a discovery of the fraud or force.

18. Lady Shovel had devised 4000 *l.* in trust for the separate use of a feme covert; and upon a bill brought by husband and wife against the trustees, though the wife herself was in court and consented that the money should be paid to her husband, yet the Master of the Rolls would not decree it, but dismissed the bill.

19. A wife may as well dispose of personal estate, over which she has an absolute control, as she can of real estate, by joining in a fine with her husband; and on her consent (in court) her whole fortune was directed to be paid to the husband, though he appeared to be an insolvent person.

refused to refer it to a Master, which, he said, was never done unless fraud or compulsion appeared;

20. A father by deed creates a trust of a real estate for the benefit of his daughters, and directs

A a 2

2 *Eq. Abr.* 136. pl. 1.
The suggestions of duress and fraud in the wife's answer not appearing upon the proofs (though the reserving the equity of redemption to the husband and his heirs, without any mention of the wife looks a little suspicious), it was needless to determine how far so solemn an act as a fine might be affected by it. It is well known that the operation of fines and recoveries is the same upon trust estates as upon legal estates; and if so, it must inevitably follow that an estate for life limited to the wife, and the remainder limited to her own right heirs in default of any appointment made by her last will, are both disposed of by the fine; and that if no such remainder had been limited by it, as the estate was the wife's own, and moved originally from her, whatever was not conveyed would have remained in her, and consequently been barred. This answers the objection of its being a naked power or power in gross, and so not barred by the fine, for how can that be called a naked power which is to operate and take effect on the party's own estate? It is certainly a power coupled with an interest and annexed to her inheritance, and so

M. 1734, cor. *M. R.*
Blackwood v. Norris,
cited in *Penne v. Peacock*,
Ca. temp. Talb. 43.
Ld. Talbot said, this was a case of *personalty* only, and somewhat particular.

2 Nov. 1740, cor. *M. R.*
Willats v. Gay, 2 *Atk.* 67.
In this case the wife appeared in court, and was examined, when she desired that the whole might be paid to her husband, without expecting any provision for herself, upon which his Honour refused

2 Nov. 1740, cor. *M. R.*
Stanford v. Marshall. 2 *Atk.* 68.

the

His Honour said the daughters had an absolute power over the rents and profits, and the court will never encourage the locking up of property, which would be the case if the daughters could not create any lien they thought proper on their interest in the estate. *Vide Hulme and Tenant*, 1 Bro. Ch. Ca. 16.

the rents to be paid them, whether sole or covert, for their separate use: they marry and join with their husbands in bonds for money lent to their husbands. The trustees under the father's deed ordered to pay the rents and profits of the trust-estate to the bond creditors.

29 Ap. 1741, cor. Hardw. C.
Grosvenor v. Lane, 2 Atk. 180.

21. *P.* gives a third of a moiety of the residue of his personal estate to *S. P.*, who marries, and whilst out of the kingdom assigned, together with her husband, the third of a moiety which was to arise out of *P.*'s estate, in trust for their daughter, provided they died before they came to England. *S. P.*'s first husband died, and she afterwards married a second who survived her. *If she had continued a widow she would have been entitled to a decree for this third, and no notice would have been taken of the daughter's interest.*

2 Aug. 1742, cor. Hardw. C.
Partridge v. Powlet,
2 Atk. 384.

22. A husband has a mortgage upon his estate, the wife joins with him in charging her own. If she survives, her estate shall be looked on only as a pledge, and she is entitled to be satisfied out of his estate as standing in a mortgagee's place.

13 Nov. 1742, cor. Hardw. C.
Lacey v. D. of Arbol, 2 Atk. 448.
Vide Willats v. Cay, 2 Atk. 67.
Oldham v. Hughes, 2 Atk. 454.
Milner v. Colmer, 2 P. Wms. 642.
Frazer v. Baillie, 1 Bro. Ch. Ca. 518.
Minit v. Hyde, 2 Bro. Ch. Ca. 663.
Dimmock v. Atkinson, 3 Bro. Ch. Ca. 195.

Adams v. Cole, Ca. temp. Talb. 168. cont. is a strong case, but then it was a settlement made after, upon an agreement before marriage, and Lord Talbot laid the stress altogether upon its being the express agreement of the parties, and for that reason decreed for the representative of the husband against the representative of the wife.

23. A wife had a great accession of fortune some time after her marriage, and the husband made a second settlement, which was by no means adequate to the addition. If in such case application had been made to the court, the Master would have been directed to inquire if the husband had made an adequate settlement, and the court would have examined the wife (in analogy to a fine at law) if she consented to the second settlement; and if she did, her consent would have bound her: but it is going too far to say the wife should be bound without her consent or the intervention of this court.

20 Nov. 1742, cor. Hardw. C.
Oldham v. Hughes, 2 Atk. 452.

24. Testator covenanted to lay out 20,000*l.* in lands, and settle them to the use of himself for life, remainder to his first and other sons in tail, remainder to his right heirs. His heirs were his sister *C.* the wife of *D.*, and plaintiff his nephew. Testator died without laying out the money, then *C.* died, and plaintiff became her heir. *D.*, the husband of *C.*, insisted that she in her lifetime by certain articles had converted the money into personal

personal estate, and that he, as her administrator, was entitled. Lord Chancellor thought the wife of *D.* was not capable of changing the nature of her estate by articles, because under coverture, and unable to contract.

Before the wife could in this case have altered the property, or course of descent, the money must have been invested in land, and there she might have levied a fine of it, and given it to her husband; or, upon coming into court, and consenting to take this money as personal estate, and being examined as to such consent, it binds the money articulated to be laid out in land, as much as a fine at law would the land; and she might dispose of it to her husband.

25. A fine was levied by husband and wife of her lands to a purchaser, but the uses were declared by the husband only. No other deed being shewn declaring different uses, and the uses declared not varying from what the wife intended, it shall bind her notwithstanding, particularly as she had acquiesced for fifteen years after her husband's death, and then brought her bill for possession, suggesting she was not bound by the fine as she did not join her husband in his declaration of the uses. Bill dismissed.

10 July 1744, cor. Hardw. C.
Swanton v. Raven, 3 Atk. 305.

26. When money is directed to be laid out in land, and limited in tail, and the tenant in tail, or remainder in tail, is a feme covert, she must come into this court that equity may inquire if it is with her consent that the money is to be paid, instead of being laid out in land, as in the case of a fine.

7 Mar. 1746, cor. Hardw. C.
Trafford v. Boebm, 3 Atk. 448.

It was said there was no precedent for this resolution, nor did Ld. Hardwicke recollect any, but said he would make one.

All the court does is in consequence of an antecedent right, and there is no occasion for a decree, except there is an incapacity of the person, as in the case of a feme covert.

Vide Chaplin v. Horner, 1 P. Wms 483.

Where a feme covert has an interest in real estate, no consent of a remainder-man can bar the entail, unless there had been a fine, nor can equity carry such agreement into execution as to a legal estate.

27. A feme covert having power to receive the profits of an estate to her separate estate, and appoint them as she pleased, joined her husband in a bill for an account, and submitting that the profits should be applied to the payment of the husband's

23 Nov. 1748, cor. Hardw. C.
Allen v. Papworth, 1 Ves. 167.

In *Hulme and Tenant*, 1 Bro. Ch. Ca. 16. Lord Thurlow said that the rule laid down in *Peacock and Monk*, 2 Ves. 190. that a feme covert, with respect

to her separate property, is competent to act as a feme sole, is a proper rule, and necessary to support the decisions on this subject.

Vide Sockett v. Wray, 4 Bro. Ch. Ca. 483. *contra* this case.

debts, it was decreed accordingly. The bill, to which she was made a party without collusion, being as much an execution of her power as an actual appointment would have been, and the profits were bound by the decree.

M. 1749, C. B.

George ex dem. Thornbury v. —, Amb. 617. 1 Eq. Abr. 61.

A feme covert cannot make a will of lands; it is contrary to the statute of 34 & 35 Hen. 8. c. 5. But there is no doubt that a husband may give his wife a power to dispose of her personal estate, because he hath the sole property in and power over it (a).

—As to the surrender, it was fluctuating and ambulatory (b) till some further legal act was done to complete it, and is like a presentation, which is revocable and fluctuating till induction; therefore the marriage either made it absolutely void or suspended it, in either case its operation is prevented, and of consequence no interest can vest in the defendant. The lord can never be considered a trustee in whom the land is to vest for the benefit of the devisee, for it appears plainly by Poph. 174. 4 Co. 23. and Cro Eliz. 441. that whenever the fee-simple, &c. of a copyhold estate is by surrender limited to the use of a will, the fee-simple remains in the copyholder, and is not vested in the lord; therefore he cannot be considered as a trustee. As to the mortgage, it must be bad at all events; for there ought to have been either a fine or surrender, so as the feme might be privately examined; for a custom to bar without surrender, or a private examination, would be bad.

(a) *Vide* Wright v. Lord Cadogan, 6 Bro. P. C. 156. Rippon v. Dawding, Amb. 565. Bramhall v. Hall, Amb. 467.

(b) By custom, the surrender of a feme covert, with the assent of her husband, is good. Mo. 123. cited in 2 Bro. Ch. Ca. 387.

23 Nov. 1750, cor. Hardw. C. *Parsons v. Dunn*, 2 Ves. 60.

The register mentioned a case where a woman married to a second husband was to elect whether she took under her former husband's will or her widow's part by the custom. Husband and wife appeared in court and differed. Verney, M. R. referred it to a Master to see which was most for the wife's benefit.

8 Aug. 1754, cor. Hardw. C. *Ex parte Higbam*, 2 Ves. 579.

28. A widow seised in fee of copyhold lands, surrendered them to the use of her will. Previous to a second marriage, her intended husband by articles agreed she should have power to settle or devise the estate during coverture. After marriage the baron and feme mortgaged the estate for 99 years (under the lord's licence), without a surrender or fine levied; afterwards the wife made her will, devising the premises to her second husband and his son, and then died. Upon an ejectment by the heir at law, the court declared for the lessor of the plaintiff; for testatrix being a feme covert could neither make a will or declare the uses of the surrender.

The lord can never be considered a trustee in whom the land is to vest for the benefit of the devisee, for it appears plainly by Poph. 174. 4 Co. 23. and Cro Eliz. 441. that whenever the fee-simple, &c. of a copyhold estate is by surrender limited to the use of a will, the fee-simple remains in the copyholder, and is not vested in the lord; therefore he cannot be considered as a trustee. As to the mortgage, it must be bad at all events; for there ought to have been either a fine or surrender, so as the feme might be privately examined; for a custom to bar without surrender, or a private examination, would be bad.

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29. A husband and wife having come to an agreement respecting the wife's separate property, and being at *Paris*, had executed a power of attorney, authorizing a person here to consent. *Per cur.*—That will not do: the wife must consent in court, or a commission must issue like a *dedimus* in case of a fine.

30. The husband petitions that his wife's fortune, near 1000*l.*, should be paid to him out of the Bank; they had been married about half a year. The wife was lately come of age, and being in court, was very desirous it should be so; and the husband said he could make more of it in his trade of a trunkmaker than to make any settlement on his family. Lord Chancellor said he might do so; but he might also spend it. Decreed 400*l.*, part of the portion to be settled on his wife and family.

31. A petition by the husband and wife that her personal estate, amounting to about 3000*l.*, should be paid to him out of court, the wife consenting thereto, and proposals being made for a settlement. But the court would not grant it, there being a possibility of issue, and nobody to consent for children; and the husband, who was in *Jamaica*, might die before he came home.

20 July 1755, cor. Hardw. C.
Ann. 2 Ves. 672.

32. A wife had called in her separate estate with her husband and trustee. The husband had managed the estate, and after his death the wife had done many acts to confirm it as part of his estate (a). She was barred from claiming this property.

28 July 1755, cor. Hardw. C.
Pawlet v. Delaval,
2 *Ves.* 663 to 671.

(a) In transactions between husband and wife the court goes farther upon presumption than between strangers. *Vide Powell v. Hunkey*, 2 P. Wms. 82.

A bill by the husband and wife in her right is the bill of the husband.

A wife is not permitted to dispose of her separate estate without the intervention of trustees.

The acquiescence of the wife is material to determine property; as where a freeman's widow acquiesces under her husband's will, she is bound thereby.

The court has not absolutely determined that a wife may not dispose of her separate property to her husband, unless by consent in court, or intervention of friends or trustees.

Cowey v. Richardson, at the Rolls, 2 MS. case never printed, (Reg. Lib. A. 491, 492. 11 July 1725,) was cited to shew that this court would not permit a wife to dispose of her separate

trust property to her husband, unless by her judicial consent or the intervention of friends.

There have been several instances where it has been done by act *in pais*, and where no menace or imposition appeared.

And there have been many instances where the wife's property has been pledged for the husband's debt with her concurrence, but the husband was held bound to exonerate it.

Lord Hardwicke said, these rules had been too generally laid down.

33. Husband and wife, having joint power over the wife's estate, empower an agent to sell part of it *by auction*. He articles to sell it *by private contract* for more than the price required. The husband had written a letter to the agent, in which he only desired his wife's compliments; that is no proof of her joining in giving an authority to the agent, and the buyer shall not compel specific performance.

1765, cor. M. R.
Daniel v. Adams, Amb. 495.

Vide Drury v. Drury; *Baker v. Child*, 2 Vern. 62. *Barrington v. Horne*, M. 1 G. 2. *Hall v. Hardy*, 3 P. Wms. 187.

His Honour said, this was not like the case of a factor selling goods at a less price than he was commissioned, by which his principal would be bound; for that was for the convenience of trade.

Nor like the case of an attorney bidding more than he was authorized for an estate at a sale under a decree. His Honour thought in the latter case the attorney would be bound, but doubted if his principal would.

T. 1778, cor. Thurlow, C.
Hulme v. Tenant & Ux.
 1 Bro. Ch. Ca. 16.
 1 Eq. Abr. 63.

34. The wife joins her husband in a bond to secure 180*l.* Bill by the obligee against the husband and wife, and her trustee, to recover the money out of her separate estate. On the marriage one part of the wife's estates were conveyed to trustees in trust to pay the rents and profits of the freehold and leasehold parts to her for her separate use, and to convey the estates themselves as the wife should by deed or will appoint; and in default of appointment, to her heirs and assigns. Other part of the estates were directed to be sold, and out of the produce 1000*l.* to be laid out according to the wife's direction; the interest to be paid to her, and the principal to her or her order, by note or writing under her hand; and for want of such appointment, to her executors, administrators, and assigns. This 1000*l.* had been raised and applied, so that the question was with respect to the remedy against the other estates. The cause was heard before *Bathurst, C.* who dismissed the bill, and it now came on to be heard. *Per Lord Thurlow.*—*Grigby v. Cox*, 1 *Ves.* 517. was a decree for a specific performance, but that case does not state the trust. It is said a feme covert is a feme sole with respect to every authority she can create over her estate, but it is different where the consent of the trustees is made essential to the conveyance, though the mere appointment of trustees is not sufficient to deprive her of that authority, for without trustees a wife can have no separate property. His lordship doubted as to the form of relief, for the bill prayed the most extensive a separate property could afford. The rule laid down (a), that a feme covert with respect to her separate property is competent to act as a feme sole, is the proper rule. In consequence, where a bill was brought by husband and wife for an account, the wife, together with the husband, submitting that the profits of her separate estate should be applied to pay the husband's debts, she was bound by that submission, and the court decreed accordingly (b). So in *Grigby v. Cox* (c), the court held the wife bound by her contract to sell her separate estate, being authorized by the settlement to dispose of it. The principal case however goes further: it is not only how far the wife may act upon her separate property, but how far her *general personal engagements* shall be executed out of her separate property. It is clear such

(a) In *Peacock and Monk*,
 2 *Ves.* 190.

(b) *Allen v. Papworth*,
 1 *Ves.* 163.
 (c) 1 *Ves.* 517.

general

general engagement will not bind a wife, neither will the court order a feme covert to execute a power; but when the power has been executed, the court will give a remedy by stopping the fund. His lordship was exceedingly clear that in this case the wife's leasehold estates would be liable, and referred it to the Master to take an account of the rents and profits of such leasehold estates; but the parties came to a compromise before the Master made his report.

Vide notes to *Pybus v. Smith*, *post*, which mention Lord Loughborough's observations on this case in *Whistler v. Newman*, T. 1798.

35. Where trustees are interposed, the court will not authorize a woman's parting with her life interest in a sum of money, upon examination in analogy to a private examination on a fine at law.

T. 1780, cor. Eyre, B. abf. C.
Frazer & Ux. v. Bailie and others,
1 Bro. Ch. Ca. 518.

36. Where a feme covert, who is abroad, is entitled to money, which she consents shall be paid to her husband, her examination and consent shall be taken by a magistrate of the place where she resides, attested by notaries, and translated on oath.

T. 1789, cor. Thurlow, C.
Minit v. Hyde,
2 Bro. Ch. Ca. 663.

In all applications for money of the wife to be paid (by consent) to the husband, an affidavit shall be made that there is no settlement on the marriage.

It was suggested in the present case, that the settlement was before the marriage, affecting only the husband's fortune, and not the money which had come to the wife, and that they had an affidavit to that effect. The payment was ordered.

37. A feme covert is a feme sole as far as the instrument creating her separate estate makes her proprietor, and if she pledges it according to her power, the trustees must hold to the uses she appoints; but as in this case the wife under her power appointed for the benefit of her husband, and as a security for his debts, the court referred it to the Master to inquire under what circumstances the deed was executed, who reported that it was executed freely, and without any undue influence. *Per* Lord Chancellor.—If the point was open, a feme covert, having a separate estate, ought not to part with it without an examination; a feme covert is considered by the court as a feme sole with respect to her separate property, therefore, though his lordship was desirous of going as far as he could, he found that, on a former occasion (a), he had gone too far. If a feme covert sees what she is about, the court allows of her alienation of her separate property. If it was the intention

21 June 1790, cor. Thurlow, C.
Pybus v. Smith, 1 Ves. jun. 189.
S. C. Heard on the Master's report, cor. Ld. Thurlow, 3 Aug. 1791, 3 Bro. Ch. Ca. 340.

(a) In *Ellis and Atkinson*, 3 Bro. Ch. Ca. 567. the wife appeared in court, but Ld. Chancellor doubted if he could take her consent; he took it, however, as far as it might be available, desiring its effects might be considered. In *Clarke v. Pistor*, cor. M. R. 25 Mar. 1777, the wife had a power by settlement to appoint the dividends of her

stock (in trustees' names) from time to time, and in default of appointment the trustees were to pay the same into her proper hands for her separate use, and upon her death to transfer the principal to her husband absolutely. On a bill by the husband and wife, without appointment, and on consent of the wife, the court directed the trustees to transfer. — In *Newman v. Cartney*, 2 April 1771, a legacy had been given to the wife with a power of appointment by will, and in default to her executors. It was ordered, on the wife's consent, to be paid to the husband. In *Whistler v. Newman*, 4 Vef. jun. 129. a settlement was made upon marriage of stock, the property of the wife, in trust from time to time to receive the dividends and pay them into the hands of the wife for her sole and separate use, her receipt only to be a discharge; after her decease, to the husband for life; and after the death of the survivor, to transfer the principal to the children as the wife should by will appoint, and in default, equally; if no children, according to the wife's appointment by will. The trustees, with the privity of the wife, sold the stock and paid the money to the husband, who died insolvent. The trustees took the husband's bond of indemnity, to which the wife was a subscribing witness, which the trustees set up as the instrument of her consent. Lord Loughborough regretted those decisions which bound him to say that a married woman may dispose of her separate property, and that the trustees must follow her disposition; but his lordship thought the disposition of the principal in this case a gross breach of trust. If, by the refusal of the trustees, the purpose had failed entirely, the fund would have remained. The bill in this case was filed by the widow and children, upon which the trustees having replaced the fund, it was transferred to the Accountant-General upon the trusts of the settlement, notwithstanding the trustees objected that the wife ought to be bound by her acts. The trustees were ordered to pay the dividends to the widow from the death of her husband, together with costs. At the hearing, the case of *Hulme v. Tenant*, *Pybus v. Smith*, and *Ellis v. Atkinson*, were examined and discussed, which favour the right of a married woman to the separate use of an income of a real estate or funded property (vested in trustees) and over the same *sui juris*, without any formal examination, and the court dealt with her exactly as they would have done with the husband. On the other hand a reference was made to *Socket v. Wray*, 4 Bro. Ch. Ca. 483. and to *Hyde v. Price*, 3 Vef. jun. 437. Lord Loughborough did not hold it necessary to go into an investigation of these different cases; but his lordship could not help remarking, that if the rule laid down in them was to be pushed to its full extent, a married woman having trustees, and her property under the administration of the court, is infinitely less protected than if left to her legal rights, as far as they consist of rights which the husband cannot *proprio Marte* affect. Such rights cannot be taken from her without a formal deed, not by implication and inference from conversation or conduct. Upon *Pybus v. Smith* it would be the vainest thing in the world to make a settlement upon a woman marrying under the direction of the court, for the settlement was made after a reference to a Master, and approved by the court; and at the very time the settlement was submitted to the court the transaction was going on by which the effect of it was to be taken away from her, and she gave up the benefit of all that care which the court was taking for her protection. When it may be necessary with regard to creditors to enter into the consideration of these cases, it will be to be considered whether the court ought to do more than this. Where the creditor of the husband or of a feme covert has got any legal hold of the fund he certainly must keep it; but if he has no legal hold, upon what principle can equity better his situation and improve a security which the law will not acknowledge? It is going farther than justice and equity will warrant to extend that beyond any legal right which may have been got by the aid of a court of equity.

For the principle as to the equitable interest of the wife, as between her and her husband or those claiming under him, *vide Macaulay v. Philips*, 4 Vef. jun. 15. *Like v. Beresford*, 3 Vef. jun. 506. and the cases there cited.

28 Dec. 1790, cor. Thurlow, C.
Dimmock v. Atkinson,
3 Bro. Ch. Ca. 195.

38. Petition by a husband, who had six children, to have part of his wife's fortune paid to him. His wife appeared in court and persisted in her consent, notwithstanding a long examination and a strenuous opposition by counsel; wherefore Lord Chancellor ordered the money to be paid, after taking till the next day to consider of it.

H. 1791, cor. Thurlow, C.
Burdillon v. Asair,
3 Bro. Ch. Ca. 237.

It was admitted, in this case, before commissioners, she being abroad. to be usual to pay over the money without a commission where the sum is under 100 l.

39. A wife's legacy (being 167 l.) shall not be paid to the husband without her consent taken before commissioners, she being abroad.

40. A wife mortgaged her separate estate to enable her husband to purchase the estate on which he lived, and the husband applied the mortgage-money to that purpose. The wife's consent was obtained by a promise to settle the purchased estate to the same uses to which the wife's estate was settled, but that was never done. The husband died leaving a small annuity to the wife, and devised the purchased estate to his nephew, whom he also made residuary legatee, and co-executor with his wife. The husband by codicil increased the wife's life estate by a charge on other part of his property. The husband's assets at his death were more than adequate to pay his debts, including that for which his wife made her mortgage; whereupon the wife filed her bill to have her estate exonerated. *Per cur.*—There is no doubt of the rule, that where a woman pledges her estate for her husband she shall be a creditor for the money. The questions in this case were, whether she had shewn or declared any intention to the contrary, and whether parol evidence of such an intention is admissible as in the case of a principal and surety? It was in evidence by the answer of the defendant, who was the wife's co-executor, (and was since dead,) that she said she had (since her husband's decease) relinquished the idea of calling on her husband's estate for her mortgage, and that she desired him to pay the legacies, which was corroborated by one witness, who gave evidence of a similar conversation between him and the wife. Lord Chancellor could not distinguish this from the case of an heir who tells the executor to pay the legacies, and that he will not press him to exonerate the estate, upon which assurance the executor pays. It would be contrary to the rules of equity to say the heir should not be barred by such a concession, it would countenance a fraud on the executor; and in the present case, the widow by her declarations clearly disclaimed her right. Bill dismissed.

41. Husband and wife levy a fine of the wife's estate, and settle the same with a power to them to revoke and declare new uses; they afterwards join in a mortgage term to secure a sum redeemable on payment by the husband, or the persons to whom the freehold should belong. The mortgage was paid off, and the term assigned to a trustee to such uses as the husband should appoint: he afterwards,

H. 1791, cor. Thurlow, C.
Clinton v. Hooper,
3 Bro. Ch. Ca. 201.
Vide Reason v. Sacheverell,
1 Vern. 41.
Grey v. Kentish, 1 Atk. 280.
Tate v. Austin, 1 P. Wms. 264.
2 Vern. 689.
Bagot v. Oughton, 1 P. Wms. 347.
Evelyn v. Evelyn,
2 P. Wms. 659.
Lewis v. Nangle, Amb. 150.
Ld. Kinnoul v. Money,
Mar. 1767.

P. 1792, cor. Thurlow, C.
Astley and others v. Earl of T...
heruville and another,
3 Bro. Ch. Ca. 545.

wards, without the wife, borrows a further sum, and makes the term a security, and the trustee joins him in the assignment. The husband by will orders his personal estate to be applied in payment of debts, except those secured by the mortgaged estates. This is the husband's debt, and shall be paid out of his personal estate, not by the mortgaged term.

6 July 1792, cor. Lds. Comrs.
Binford v. Bruden,
1 Ves. jun. 512.

42. Money was devised to be laid out in land for a feme covert in tail, with reversion to her in fee: and it was prayed, according to the course of the court in such cases, that she might be examined by commission, apart from her husband, as to her inclination with regard to the disposition of the money; and that if she chose to take it in money, it might be paid to her. The court accordingly awarded the commission to examine her separately, but reserved further directions; because it would be necessary, if she elected to take the devise in money, to inquire, before it was paid over to her, whether she had a settlement.

25 Dec. 1792, cor. Lds. Comrs.

S. C. Upon the return of the commission in this case, the certificate was, that the wife chose not to have the money laid out in land, but paid to her husband. But the court required an affidavit from the husband and wife that the money was not settled, before they would order it to be paid to the husband.

T. 1792, cor. Thurlow, C.
Ellis & Ux. v. Atkinson,
3 Bro. Ch. Ca. 565.

43. A husband entitled to 4000*l.* secured on mortgage, on a marriage treaty proposed to settle 2000*l.* on his intended wife for her separate use, and to be at her disposal, notwithstanding her coverture; and accordingly assigned the said 4000*l.* mortgage to trustees in trust as to one moiety, to pay the interest into the proper hands of the wife, or as she should *from time to time* appoint in writing: the same to be free from the debts and control of the husband, and the receipt of the wife alone to be a good discharge; and in case the wife should survive, then in trust for her executors, &c. but if she should die in her husband's lifetime, then as she by deed or will should appoint; and in default of such appointment, in trust for the executors or administrators of the wife as part of her personal estate. The marriage took effect, and the interest was regularly paid to the wife; but the husband and wife having agreed that she should give up all her interest in the 2000*l.* to her husband,

band, she, by deed-poll reciting her power, directed and appointed her husband, and his assigns, to receive the interest during their joint lives, and if he survived, then the whole to be paid to him, his executors, administrators, and assigns. The husband and wife applied to the trustees to assign according to the wife's appointment, and upon their refusal the present bill was preferred. *Per* Lord Chancellor.—The question is, whether, from the peculiarity of this trust, it did not intend the whole to the wife if she survived? If it was not to be paid according to the instalments, then whether the wife can dispose of her eventual interest, or of the produce in the mean time? The cause stood over, and then his lordship decreed that the trustees should assign the moiety of the 4000*l.*, agreeable to the wife's appointment. The husband to pay costs.

44. A feme covert attended in court to give her consent that her portion (being a residue of an intestate's estate) should be paid to her husband, when got in. *Per cur.*—That would be in effect taking her consent now to a sum to be ascertained *in futuro*, and thereby depriving her of the power of changing her mind in the interim, which the court ought not to do.

12 Dec. 1792, in *Scacc.*
Edmonds v. Townsend,
1 *Anstr.* 93.

45. A sum of money was invested in trust for a feme covert, to pay her the interest for life to her separate use, and after her decease to such person, and subject to such power, as she should by any instrument in writing *from time to time* or by will appoint (during her *present* coverture). Bill by the husband and wife against the trustees that they may be decreed to sell the funds, and pay the principal to the husband: the wife appeared in court and consented. *Sed per* Master of the Rolls.—The effect of the deed is to pay the dividends to the wife, or as she shall appoint for life; and after her decease according to her *appointment by will*. The question is, whether, under such a trust, the wife can waive the benefit of the deed, and give away the whole capital at once during her life? His Honour said he could not conform to it, and, after taking a view of the cases (in the margin), dismissed the bill.

17 Jan. 1793, cor. M. R.
Sackett & Ux. v. Wray and another, 4 Bro. Ch. Ca. 483.
Vide Newman v. Cartony, cited 3 Bro. Ch. Ca. 346. and in note p. 568. *Hulme v. Tenant*, 1 Bro. Ch. Ca. 16. *Pybus v. Smith*, 3 Bro. Ch. Ca. 340. *Ellis v. Atkinson*, 3 Bro. Ch. Ca. 565. *Norton v. Turvill*, 2 P. Wms. 141.

His Honour observed there was something remarkable in this case, that the restraint is only during the *present* coverture. If the wife survived her present husband the restriction was thought unnecessary, therefore during the life of her present husband she can only dispose of it *by will*.

46. A settlement was made of money vested in trustees in trust for the husband and wife successively

T. 1793, in *Scacc.*
Guisse, Bart. v. Small & al.
1 *Anstr.* 277.

sively for life, remainder to the children, and in default of issue to such person as the wife should appoint. The husband being in distress, the wife appointed to him by deed. Bill to have the consent of the wife taken to this conveyance, and the appointment established subject to the claims of the husband and wife for life, and the right of the children. The court ordered the money to be paid into court for the contingent trusts of the settlement, and, upon taking the wife's consent in court, decreed the conveyance should be established.

M. 1794, cor. Loughb. C.
Bibbes v. Buft, 2 Ves. jun. 488.

47. *A feme covert* by deed directed rents and profits, her separate property, to be paid during her life to her husband for his own proper use and benefit; the intention being only to give him the administration during coverture without account. After his death the widow is entitled to the future rents, and to those accrued in his life and not received. If her interest had passed, it must, upon the circumstances of the transaction, have been set aside.

A feme covert may bind herself and contract debts; she may be sued, and the debt may be recovered against her (*Corbet v. Poelnitz*, 1 Term Rep. B. R. 5.). She may also transact and make

bargains with respect to her separate estate; but Lord Chancellor thought the modern determinations that a feme covert as to her separate property was a feme sole to all intents and purposes, was carrying the subject farther than was ever intended. His lordship could not find but one case where the question arose distinctly upon a gift between a husband and wife, and that was *Pawlet v. Delaval*, 2 Ves. 663. in which Lord Hardwicke established it, but under circumstances that marked very strongly how much of aid he required to establish a conveyance by a married woman of her separate property in favour of her husband.

The course of the court is not to establish a deed between husband and wife on her separate estate without the presence of the wife in court, where the trustees put the parties to file a bill.

29 July 1796, cor. Loughb. C.
Watt v. Watt, 3 Ves. jun. 244.

(a) The husband's claim derives no aid from the probate, for the ecclesiastical court has no jurisdiction to determine whether an instrument is a good execution of a power.

48. The trust of the marriage settlement in this case was for the next of kin of the wife's own family, subject to her appointment by will attested by two witnesses. The wife appoints in favour of the husband by will unattested, which the husband proves (a); and then the children file their bill against the husband and trustees, claiming as next of kin in default of appointment. *Per cur.*—It is beyond controversy, that the unattested will of the wife is no execution of the power. The children claim by limitation, and the spiritual court

court cannot determine what are the objects upon whom that limitation attaches. The description of next of kin cannot apply to the husband; the wife's personal property vests in him by marriage, and he claims *jure mariti*. Administration is granted to the husband as husband, and is necessary to enable him to get in the wife's personal estate (a); there is no statute law that gives the husband a right to administer to his wife, but his right is supposed in all the statutes. The 21 H. 8. c. 5., which directs who shall have administration, takes no notice of the husband; they are to grant to the widow or next of kin, or both: *ergo*, that statute does not take the widow to be next of kin, and it is silent as to the widower, for he takes by law. The statute of distributions (b) has a clause, that *that statute* shall not prejudice the right of the husband; the husband is not of kin to the wife, nor the wife to the husband. The statute gives administration to the widow, and she takes not as next of kin, but as widow (c). Decreed, the husband in this case entitled for life to the dividends of the trust-monies according to the marriage agreement, and that the trusts of the settlement be in other respects executed by the trustees, the wife having made no appointment. The costs to come out of the dividends.

the personal representation of the husband. *Cart v. Rees*, 1 P. 3 Atk. 526. 1 Willf. 168. 1 Vef. 15.

49. A married woman living in *America* being entitled to a legacy, a commission to examine her, as to her consent to whom it should be paid, would have been directed; but as she had been examined under a commission issued by the *American* government, that was considered sufficient.

Sec. 8. What Contracts, Rights, or Claims between Husband and Wife are or are not dissolved by Marriage.

1. Plaintiff, being executrix and residuary legatee of her former husband, lends 100*l.* to A. and B., for which she took a note in her own name; and, as a further security, she took also a bond from A. and B. in the name of a trustee:

6

she

(a) For this purpose the husband has a right to claim letters of administration from the spiritual court.

(b) 22 & 23 Car. 2. c. 10.
29 Car. 2. c. 3.

(c) Co. Litt. 46. b. 351.
Bacon v. Bryant,
11 Vin. 88. pl. 25.
Squib v. Wyn, 1 P. Wms. 378.
Humphrey v. Bullen, 1 Atk. 453.
11 Vin. 88. pl. 2. 6.
If the husband dies without having administered to his wife, her next of kin taking out administration to her is a trustee for Wms. 381. *Elliot v. Collier*,

24 Feb. 1797, cor. Loughb. C.
Campbell v. French,
3 Vef. jun. 321.
Vide Sawyer v. Shute,
1 Anstr. 63.

P. 1693, Cans.
Cotton v. Cotton, 2 Vern. 290.
Proc. in Ch. 41.
1 *Eq. Abr.* 63. pl. 4.
Note; The court compared this to a case where a man joins with a woman he is about to marry in

assigning her personal estate in the afterwards married *B.* one of the obligors. trust for herself, in which case *Held*, this bond is not extinct. he shall not have the benefit of it, or if it should be so taken, yet because the husband lived with his wife two years, and was party to the bond, and did not procure it to be delivered up and discharged, and being now dead, leaving his wife wholly unprovided for, the court would not hinder her of the means of providing for herself. *Proc. in Ch.* 41.

H. 1704, cor. *Wright, C. S.*
Atton v. Atton, or Pierce,
Proc. in Ch. 237. 2 *Vern.* 408.
1 *Eq. Abr.* 63. pl. 5.
Vide Cotton v. Cotton,
2 *Vern.* 290.
Cannel v. Buckle, 2 P. Wms. 243.

2. A man before marriage gives a bond to his intended wife to leave her 1000*l.* if she survives him, and then marries her, and dies intestate. His estates, both freehold and copyhold, being all in mortgage, the widow takes out administration, and, on a bill against the heir and mortgagee, was let in to a redemption of the whole, and was permitted to hold the land till satisfied, though the bond was released, and gone at law by the intermarriage, and though the copyhold was not affected by the bond, *it being in the nature of a marriage agreement.*

M. 1724, cor. *Macclesfield, C.*
Cannel v. Buckle, 2 P. Wms. 243.
2 *Eq. Abr.* 23. pl. 24. 136. pl. 1.

(a) *Vide Gage v. Atton,*
Com. 67. *Salk.* 325. Bond to pay money after a marriage between the obligor and obligee. The debt is only suspended by the intermarriage, *Atton v. Pierce,* 2 *Vern.* 480. Bond by the husband to the wife before marriage to leave her 1000*l.*, though extinguished at law by the marriage, yet good in equity and shall bind the real affects; and decreed the wife after her husband's death to redeem a mortgage and to hold over, though copyholds as well as freeholds are included in the security.

Note; Lord Macclesfield thought it unreasonable that the intermarriage, upon which the bond alone is to take effect, should itself be a destruction of the bond. The foundation of this notion is, that in law the husband and wife being one person, he cannot (at law) sue his wife on this agreement. Yet in equity it is constant experience that the husband may sue the wife and the wife the husband, and he might sue her in this case upon this very agreement. Neither is it a rule, that where an action cannot be brought at law upon an agreement for damages a suit in equity will not lie for a specific performance. Suppose a feme infant seised in fee (1), on a marriage with the consent of her guardians should covenant in consideration of a settlement to convey her inheritance to her husband, if this were done in consideration of a competent settlement equity would execute the agreement, though no action at law would lie to recover damages.

(1) As to the case of the feme infant. *Vide Lucy v. Moore, 3 Bro. P. C.* 514. *Price v. Seys, Barnard.* 122. *Seamer v. Bingham, 3 Atk.* 56. *Harvey v. Ashley, 3 Atk.* 607 *. *Earl of Bucks v. Drury, 5 Bro. P. C.* 570 †. *Durnford v. Lane, 1 Bro. Ch. Rep.* 106 †. *Williams v. Williams, 1 Bro. Ch. Ca.* 152. *Sloman v. Glubb, 2 Bro. Ch. Ca.* 545.

* Lord Hardwicke said, it was going a great way to decree an execution of the agreement in such case, as it related to the wife's inheritance, yet there are cases in which the court will do it, as if the lands of the wife were no more than an adequate consideration for the settlement the husband makes, and after the marriage the wife should die and leave issue, who would be entitled to portions provided for them by the settlement, it would in that case be very reasonable to affirm that settlement.

† In *Durnford and Lane*, Lord Thurlow said, *Drury and Drury* was a question at law, which *Cannel v. Buckle* was not. If Lord Hardwicke's opinion in *Harvey v. Ashley* be right, he has determined the point in *Cannel v. Buckle*.

‡ *Ibid.*

M. 1728, cor. *King, C.*
Lucy v. Moore & al. Mos. 59.
Affirmed in Parliament 21 April

4. By articles made previous to the marriage of a female infant, and in consideration of 3500*l.* then

then paid to the husband, it was agreed, that in consideration of a suitable jointure to be made by the husband after the wife should come of age, and in bar of her dower on his estates she should convey her lands to be limited to him in fee. The jointure was accordingly settled, and the wife (being of age) was a party to the deed; but she never conveyed her own estate, nor was she ever required by her husband so to do (a). The husband died, and the wife entered upon the settled lands. Held she was not bound by the articles, and her acceptance of the jointure did not amount to a confirmation of them; she therefore kept her own estate and the jointure also.

1730, 3 Bro. P. C. 514.
Vide Cannel v. Buckle, 2 P. Wms. 243. *Price v. Seys*, Barnard, 122. *Seamer v. Bingham*, 3 Atk. 56. *Hervey v. Ashley*, 3 Atk. 607. *Earl of Bucks v. Drury*, 5 Bro. P. C. 570. *Durnford v. Lane*, 1 Bro. Ch. Ca. 106. *Williams v. Williams*, 1 Bro. Ch. Ca. 152. *Slocomb v. Glubb*, 2 Bro. Ch. Ca. 545.
 (a) It appeared in this case that the wife's dower on the husband's hands amounted to more than her jointure, which accounts for the husband's not calling upon her to convey her own estate.

5. A *chose en action* of the wife before marriage charged upon the husband's estate, shall not, after the death of the husband, survive; but shall be considered as merged.

24 June 1740, cor. Hardw. C. *Seys v. Price*, 9 Mod. 217. *Barnard*, 117.

In this case it seems the husband had made an adequate settlement on his wife, so as to become a purchaser of her fortune, but if the settlement had been inadequate to the fortune and degree of the wife, the court would certainly have given her the *chose en action* to which the law entitled her.

6. A. by deed on the marriage of B. his son settles the estate in question on the issue male of B., and if no issue male, then he directs the estate to be sold, and the produce divided equally among the daughters of B. By deed of 29th April 1702, B. directs the estate to be sold, and the produce to be divided among his six daughters, provided he should have no son. After the marriage of C. one of the daughters of B. to D., by deed of 7th October 1714, between D. and C. his wife of the one part, and B. of the other part, reciting the deed of 29th April 1702, D. covenanted that all such right in land or money as should accrue to C. in her lifetime, or to D. in her right, by virtue of the recited deed, should be vested in three persons (who were also parties to the deed in 1714) upon trust to put out the share of C. in the produce of the estate so to be sold on security, and to pay the interest thereof to D. for life, then to C. for life, and after the death of the survivor then the principal to be divided among the children of the marriage equally, with benefit of survivorship (except such issue male as might be immediately inheritable to the lands, &c. who were to take only in failure of other issue). And if no children, then to the survivor of C. and D. absolutely. There was one son of this marriage, E. who survived his father, and became of age, and then died in the lifetime of his

11 June 1743, cor. Hardw. C. *Seamer & al. v. Bingham*, *Strode v. Strode*, 3 Atk. 54.

mother, who married *F.* *G.* the heir of *E.* insists that the interest of *C.* ought to be deemed real estate, and that it vested in *E.* in nature of a remainder after her death, and descended to him as heir at law. Plaintiffs are the children of *D.* by a first *ventre*, and half sisters of *E.*, who insist that the share of *C.* must be considered as money that is vested in *E.*, and was transmissible to his personal representatives. Defendants insist that *C.* was no party to the deed in 1714, and therefore could not be bound thereby; that she was a feme covert and an infant, and that the deed was executed after her marriage, and was merely voluntary. The questions were, 1st, whether by the deed in 1714, executed the day after the marriage of *C.* and *D.*, the property of *C.* was bound as to her share of her grandfather's estate? 2dly, If it did not bind her, whether her executing a deed on her second marriage in 1738, which recited the deed of 1714, and that *C.* was a party, and that she thereby secured her interest in that deed as a provision for her children and herself if she survived, was an acquiescence, and bound her? And 3dly, if it did not bind her, what was the construction of the trusts in the deed of 1714? As to the two first questions, Lord *Hardwicke* would give no opinion; but he thought *C.* was not bound. If it was real estate, all the questions would be out of the case; but it must be considered as money, for it was directed to be sold (a). *Decreed*, the estate mentioned in the deed of 1702 to be sold, and the produce to be divided into six parts, as the several shares of the six daughters of *B.*, the seventh having died without issue, and unmarried: and as to the question of the share of *C.* first married to *D.* and then to *F.*, whether it should belong solely to her as having survived her first husband *D.* and all the children of that marriage? *decreed*, that it belonged solely to *C.*

(a) The rule is, that land to be turned into money is money. But there are cases where persons may insist on the land itself, as where the parties all agree that the land shall not be sold, and none of the claimants oppose it.

28 Mar. 1748, cor. *Hardw. C.*
Harvey & Ux. v. Ashley & al.
3 *Atk.* 610.

See this case stated at large under tit. Marriage.

7. Infants may contract marriage, males at fourteen and females at twelve, and these agreements differ from all others, the principal consideration being the marriage: settlements are prudential acts done chiefly for this consideration, and the estate settled may be greater or less according to the discretion of the parties. As soon as the marriage is had, the principal contract is executed, and cannot be set aside or rescinded. The estate and capacities of the parties are altered, and the children

dren born of the marriage are equally purchasers under both father and mother, and therefore it has been truly said, that marriage contracts ought not to be rescinded, because it would affect the interests of third persons, namely, *the issue*. All other agreements are considered as entire, and if either party fails in performance of the agreement in part, it cannot be decreed in specie; but in marriage agreements it is otherwise; for though either the relations of the husband or wife should fail in the performance of their part, yet the children may compel a performance.

There is no instance of an application to parliament for the marriage of a young lady who has a money portion only, merely because she is an infant; and the reason why such applications have been made with respect to real estates is, that the rights of infants may not be bound by any agreement in relation to it, unless the husband should have issue by the marriage.

Unless a father or a guardian could contract for the infant, so as to bind money-property, the husband would be entitled to it immediately on his marriage, as it is a personal thing.

Where a jointure is made after marriage, and the husband dies, leaving his wife an infant, if she without doing any act to determine her election marries a second husband; if he enters on the jointure estate, that entry will bind them both during the coverture.

8. A female infant married, having before such marriage a jointure made to her in bar of dower. She is thereby bound and barred of dower within the statute of 27 H. 8. c. 10.

26 May 1762, cor. Hardw. C.
Earl of Bucks & al. v. Drury,
5 Bro. P. C. 570.

Dower attaches upon marriage, the statute having said nothing as to the majority of the wife, it

only spoke of her when she could make the contract, and marriage may be contracted between minors.
Vide Durnford and Lane, 1 Bro. Ch. Ca. 108.

Vide Caruthers v. Caruthers, 4 Bro. Ch. Ca. 506. (n) for a full report of this case, (as determined in the House of Lords, and taken by the late Mr. Forrester,) which the reporter has published under favour.

9. The marriage settlement of a female infant is binding on her, and no act done by her and her husband can avoid it. Mortgages by them to persons who had notice of the settlement, ordered to be assigned to the trustee in the settlement, but the interest during the life of the husband and wife to be applied to the payment of the mortgages, without prejudice to her remedy against the husband.

T. 1781, cor. Thurlow, C.
Durnford & al. v. Lane & al.
1 Bro. Ch. Ca. 106.

Vide Cannel v. Buckle, 2 P. Wms. 243. *Harvey v. Ashley*, 3 Atk. 607.

P. 1782, cor. Thurlow, C.
Williams v. Williams,
 1 Bro. Cb. Ca. 152.

Vide Noy v. Mordaunt,
 2 Vern. 581.

T. 1787, cor. Thurlow, C.
Ewbank v. Hollowell,
 2 Bro. Cb. Ca. 220.

24 Feb. 1789, cor. Thurlow, C.
Slocumb & al. v. Glubb & al.
 2 Bro. Cb. Ca. 545.

10. Covenant in an infant's marriage settlement, that whatever should come to the wife from the mother *or otherwise*, should be bound by the settlement. This covenant was restrained to what should come from the mother only, and not to property coming unexpectedly from other quarters. To bind an infant, the marriage settlement must be fair and reasonable, and not to deprive her of every thing.

11. Bill by plaintiff and his wife for a legacy left to the wife by her former husband, by a will before their marriage. Marriage with a legatee is no revocation. Decreed the legacy to be paid.

12. A male infant marries an adult female, who by settlement covenants that her estate shall be settled to certain uses. *Per cur.*—If a woman before marriage conveys her property, and agrees to settle her general expectations when they shall fall in, and this without any fraud on the intended husband, such agreement shall be executed, and the husband when of age must answer her contract. It is not necessary therefore to discuss the question in this case, how far the infant husband could be bound by his own contract, but to go upon the covenant of the wife, who was adult, and the husband's covenant operates no more than to shew his concurrence, and to take away from the transaction every imputation of fraud.

Sec. 9. Where the Husband (and those claiming under him) must make a suitable Provision for the Wife: And herein of the Remedies of the Wife and her Trustees in case of the Bankruptcy or Insolvency of the Husband.

M. 1698, cor. M. R.
Parker v. Dykes,
 3 Eq. Abr. 54. pl. 6.

1. A Man had devised lands to trustees (which were in mortgage) to be sold, and the surplus of the money to be paid to his daughter; the daughter married a man who soon became a bankrupt, and the commissioners assigned this interest of the wife; the husband died, and the assignees brought their bill against the wife and trustees to have the land sold, and the surplus of the money paid to them; but the court would not assist,

assist, as the wife was wholly unprovided for. Bill dismissed.

2. By marriage articles the wife's portion was agreed to be laid out in land, to be settled to certain uses therein named, but before the trusts of the settlement could be executed, the wife, by the hard usage of the husband, was forced to leave him, and live separate from him. Bill by the wife to have the trusts of the settlement performed, and cross bill by the husband to have the money invested in a purchase. *Decreed* (on proof of the wife's ill treatment) that her portion should be placed out at interest, and that she should receive the same for her maintenance until there should be a cohabitation; for as the court will compel a husband who goes into equity for his wife's fortune to make a settlement on the wife if she survives, so much the rather ought the court to do it, where the wife is reduced to a starving condition, especially where, as in this case (a), the execution of a trust is to be directed by the court.

3. Where the husband and wife bring a bill for the execution of a trust of a real estate, devised by will for the benefit of the wife, it must be decreed according to the will; for the wife is *cestui que trust*, and it cannot be denied that she may require execution of a trust; and when she has execution, she may dispose of it as she pleases. But where the husband comes for a personal demand in right of his wife, the court may impose terms upon him.

4. A. on his marriage gives bond to leave his wife 500*l.*, or a third of his personal estate at her election, the wife having had on her marriage a portion of 500*l.* secured by land. A. becomes bankrupt. Bill by the assignees to have this 500*l.* raised by a sale, and decreed accordingly (a); but that the wife should come in as a creditor on her bond, and what shall be paid in respect thereof to be put out at interest, and the interest to be paid to the creditors during the bankrupt's life, and the principal to the wife if she survived her husband (b).

contrary to the principle of those cases which bind the husband and those claiming under him to provide for the wife where they sue for her fortune in equity; for here she seems to be wholly unprovided for during the husband's life.

(b) Lord Macclesfield is said to have doubted of this. *Vide* Ex parte Bayley, Hil. 1720; but the point coming in question before Lord King, Ex parte Caswell, 2 P. Wms. 497. his lordship ordered the precedents in Lord Cowper's time to be left with him. The case Ex parte Caswell was that of a husband's

P. 1705, cor. Cowper, C. S. and M. R. assist.

Oxenden v. Oxenden, 2 Vern. 491.
1 Eq. Abr. 67. pl. 6. and
Prec. in Ch. 239. S. C. nomine
Rockingham and another v. Oxenden.
Vide *Mildmay v. Mildmay*,
1 Vern. 53. *Watkyns v. Watkyns*, 2 Atk. 96. *Angier v. Angier*, Prec. in Ch. 499.

(a) It was objected in this case that alimony was only suable in the spiritual court, and that to decree it in this case would be to decree a divorce. The court however would not decide on this objection, in regard that a trust remained to be performed.

As to the rule, that a husband shall not take a wife's portion till he has made a reasonable provision for her; see a special note to *Jewson v. Moulson*, *post*. pl. 19.

M. 1708, cor. Cowper, G.
Lupton & Ux. v. Tempest & al.
2 Vern. 626.

1 Eq. Abr. 64. pl. 3.

T. 1710, Cane.

Holland v. Callisford, 2 Vern. 662.

It should seem that the trusts of the settlement on this marriage were as to the rents and profits of the wife's estate (*inter alia*) to the husband for life, or that he was tenant by the courtesy, else why should he be entitled to the interest of the 500*l.* for his life? and the creditors can only stand in the bankrupt's place.

(a) The assignees in this case filed their bill to have the wife's portion raised and paid by a sale of the land charged. This surely is

husband's bond to a trustee to secure 1000*l.* to his wife, if she survived him. The husband became bankrupt; this debt was not allowed, nor any reservation made for it (1); neither shall it stop the distribution, in regard it may never be a debt; but if the contingency happens before a final dividend (2), then such a debt shall be admitted.

(1) *Vide* Tully v. Sparks, *Ld. Raym.* 1546. *Ex parte* Jeffries, 4 *Vin.* 72, pl. 7. *Ex parte* King, *Dav.* 254. *Hancock v. Entwistle*, 3 *Term Rep.* 435. *Secus* where the provision is secured by a judgment or bond forfeited at law before the bankruptcy. *Ex parte* Groome, 1 *Atk.* 115. *Ex parte* Winchester, 1 *Atk.* 116. *Ex parte* Mitchell, 1 *Atk.* 120. *Ex parte* Greenaway, 1 *Atk.* 113. *Godard v. Vanderheyden*, 3 *Wils.* 271.—Where the contingency upon which the money is payable is the bankruptcy or insolvency of the debtor, such debt cannot be proved under his commission. *Ex parte* Hill, *Cooke's B. L.* 282.

(2) *Sed contra* *Ex parte* Groome, 1 *Atk.* 118.

* A judgment at law with a defeasance is not a contingent debt, 1 *Atk.* 117.

M. 1715, cor. Cowper, C.
Packer v. Wyndham,
Proc. in Ch. 412.
Gilb. Eq. Rep. 98.
2 *Eq. Abr.* 138. pl. 5, 6.

Vide *Eyre v. Countess of*
Shaftsbury, 2 *P. Wms.* 111.

5. *A.* being entitled to 5500*l.* secured by a mortgage for years taken in the names of trustees, and to 3000*l.* secured on another mortgage for years taken in her own name, and to a bond debt of 400*l.*, together with jewels and other valuables, became a lunatic, and on a commission of lunacy being issued, the custody of her person and estate was committed to one of the defendants. Some time after, *B.*, plaintiff's brother, by contrivance married the lunatic *without making any settlement on her*, and thereupon *B.* the parson, and his associates, were committed for contempt. It was then ordered, that all deeds, securities, jewels, &c. should be lodged with a Master to secure a provision for the wife in case she should survive her husband, and likewise for the children of the marriage, if any, the spiritual court having sentenced the marriage to be good; which sentence on appeal to the delegates was affirmed. On the application of *B.* the commission of lunacy was superseded; but *B.*'s estate being much incumbered, it was ordered that so much of the 5500*l.* as was necessary should be applied towards disencumbering *B.*'s estate, and the residue laid out in the purchase of lands, which, together with as much of *B.*'s estate as would make up 500*l.* *per annum*, should be settled on *B.* for life, remainder to his wife for life, remainder to the issue of the marriage, remainder to *B.*'s right heirs, and, upon *B.*'s making such settlement, the residue of his wife's fortune was to be delivered to him. *B.* never complied with this order; but being considerably indebted to *C.*, *C.* brought his action, recovered judgment, and on a *fi. fa.* took the 3000*l.* mortgage term, which was sold by the sheriff, and so the debt was paid. After this, *B.* being indebted to plaintiffs his sisters in 2000*l.* a-piece, given them for their portions, assigns said 5500*l.*, and all other the fortune which he had in right of his wife to trustees

trustees in trust, after payment of plaintiffs portions, for himself, his executors, and administrators. Some time afterwards the mortgage for 5500*l.* was paid off, and the money was placed out at interest by the Master. *B.* then died intestate and without issue, and in two years his wife died a widow. Plaintiffs took out administration to the husband, and defendant to the wife. The only question in this case then was, whether any part of the wife's fortune should be subject to plaintiffs demand (who were the heirs, the administrators, and the creditors of *B.*) as against the defendant, administrator of the *surviving* wife? *Per cur.*—As to the marriage, it has had its agitation in a proper court, and is out of the case. The order of court is also out of the case, for *B.* never complied with it; if he had, he would have been a purchaser of his wife's fortune. The reason for the interposition of equity is also at an end, the wife being dead, and no issue left. Then as to the 5500*l.*, *that being paid in during the coverture, was the husband's money, and the property absolutely vested in him by law, though placed under the control of the court for caution sake.* The reason of the court's keeping the money is at an end; the wife is dead, and there are no children. The court must give it to the husband's representatives, *to whom by law it belongs.* As to the 3000*l.* mortgage, it was sold by the sheriff before the husband's assignment of it, and a husband may assign over a term or mortgage for years which he has in right of his wife; and so he may likewise the trust of such term, and this shall prevail against the wife if she survives, therefore *B.*'s assignment to the plaintiffs might have been good as to this mortgage had it not been for the antecedent sale by the sheriff.

Æquitas sequitur Legem?

Burnet v. Kinaaston, 2 Vern. 201. is different, for that was the wife's mortgage *in fee*, which the husband alone could not dispose of.

The bond for 400*l.* was plainly a *chose en action*, and must go to the defendants, notwithstanding *B.*'s assignment; for it was not assignable at law, and there is nothing in equity to support it: but as to the jewels they must go to the plaintiffs.

The difference between a bond and a term of years is, that the bond is a *chose en action*, not assignable at law, and a term for years is a chattel real, which the husband may assign without his wife, as also the trust of such

term, and consequently the money secured by it. *Vide* *Grey v. Kentish*, 1 Atk. 280. *Bates v. Dandy*, 2 Atk. 208. *Gilb. Ch.* 277.—*Vide* also *Squib v. Wyn*, 1 P. Wms. 378. *Bosvil v. Brander*, 1 P. Wms. 458. *Cleland v. Cleland*, Prec. in Ch. 67. *Blois v. Lady Herford*, 2 Vern. 501. *Meredith v. Wynn*, Prec. in Ch. 312. *Ca. temp. Talb.* 168.

6. *W. W.* bequeathed 1000*l.* to his niece *A.*, an infant, (payable after the death of testator's wife,) on her attaining the age of twenty years, if she should so long live. At eighteen *A.* married *B.*

B b 4

without

M. 1717, cor. *Cowper, C. Jacobson & al. v. Williams*, 1 P. Wms. 382. 1 *Eq. Abr.* 54. pl. 7. *Gilb. Eq. Rep.* 140.

(a) *Bosvil v. Brander*, 1 P. Wms. 459.

(b) A court of equity will not interrupt the legal title of the husband to the property of the wife, unless called upon by the husband to lend him its assistance in respect of such property. *Vide Milnar v. Colmer*, 2 P. Wms. 639. *Adams v. Pierce*, 3 P. Wms. 11. *Willats v. Cay*, 2 Atk. 67. *Jewson v. Moulson*, 2 Atk. 420. But if he ask for equity he must do equity, by providing for the wife. *Brown v. Elton*, 3 P. Wms. 202. If the husband become a bankrupt all such property of the wife as he could assign or release passes by the commissioners assignment to the assignees. *Miles v. Williams*, 1 P. Wms. 251. But they take it subject to the same equity of providing for the wife. *Bosvil v. Brander*, 1 P. Wms. 458. *Ex parte Coylegame*, 1 Atk. 192. *Grey v. Kentish*, 1 Atk. 280. *Worral v. Marlar*, and *Bushnan v. Pell*, 1 P. Wms. 459 (n.). As to the case of a particular assignee of the husband for a valuable consideration, *vide Bosvil v. Brander*, 1 P. Wms. 458.; as to voluntary assignments, *vide Squib v. Wyn*, 1 P. Wms. 381.

(c) *Vide Higden v. Williams*, 3 P. Wms. 132. *contra*. Not only the latter statutes relating to bankrupts mention the word "possession," but 13 Eliz. c. 7. § 2. empowers the commissioners to assign all that the bankrupt might depart with; besides, 21 Jac. 1. c. 19. enacts, that the bankrupt statutes shall be construed in the most beneficial manner for creditors. *Vide etiam Jewson v. Moulson*, *post*. pl. 19.

T. 1713, cor. M. R.

Bosvil v. Brander,

1 P. Wms. 458.

2 Eq. Abr. 113, pl. 3, 4.

without the knowledge or consent of her father, B. having bribed a maid servant to get her consent. B. was greatly indebted by judgment and otherwise, and became a bankrupt before the wife had attained her twentieth year, or the portion paid. The creditors of the husband brought their bill for the wife's legacy; the bankrupt had then two children living by his wife. This cause was first heard before Price, B. who decreed the legacy to the creditors; but on the present appeal, Lord Cowper thought the assignees ought not to be in a better (a) condition than the bankrupt, and (if he had brought the bill) the court would not have allowed it him without obliging him to make some (b) provision for his wife and children; ergo the assignees who come for equity must do equity as he must have done from whom they derive their claim. As to the interest of the money, the bankrupt was allowed to receive it; so, therefore, the assignees ought to receive it during his life, as also the principal, if he should survive his wife and children. On the cause coming on again, Lord Chancellor thought it clear that the commissioners could not assign this possibility of right which the bankrupt had to the portion (c). Afterwards, in 1718, the wife filed her bill, alleging she was seduced into the marriage, and praying that the legacy might be invested to her separate use for life, and afterwards for her children, which was (by Lord Chancellor Parker) decreed accordingly.

7. A feme sole mortgagee in fee marries a trader; he becomes bankrupt and dies, the mortgage deeds being in the hands of his assignees. Bill by the widow for the title deeds, and to have the benefit of the mortgage. Master of the Rolls first decreed for the wife, but being afterwards dissatisfied with his own judgment, he ordered it to be re-argued. Upon which rehearing his Honor said, If there had been any articles before marriage agreeing that the mortgage-money should continue to the wife as her provision, or should be assigned in trust for her, the articles or assignment would have been a specific lien on the mortgage, and have preserved it from the bankruptcy. It might have been a different matter if the assignees had been plaintiffs, and desired the aid of equity to strip

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strip a widow of her all; for then the court would hardly have lent its assistance, because the assignees could have been in no better plight than the bankrupt (a), and equity (probably) would not have compelled the mortgagor to pay the money to the husband without his making a provision, or, at least, the wife by an application might have prevented the payment of the money unless some provision was made for her. But here the widow was plaintiff against the assignees, so that *she*, and not the creditors, sought the aid of equity; and here was a covenant in the mortgage deed to pay the money to the wife, so that this debt, or *chose en action*, vested in the commissioners, and was well assigned by them to the assignees, as in a case where a bond made to a wife *dum sola* was held liable to the bankruptcy (b), and assignable by the commissioners; wherefore, though the legal estate of the mortgaged lands was in the wife, she is but a trustee for the assignees (c). But in regard the bankrupt on his marriage had given a note consenting that his wife should have 200*l.*, the court relieved the wife as to that, but as to the rest dismissed the bill.

Worral v. Marlar, Bushnan v. Pell, 1 P. Wms. 459, 460. (n.) Most of which cases have arisen between the wife and the general assignees of the husband. But where the husband has assigned some particular chose en action or trust term of the wife for a valuable consideration, there is more doubt whether the court will impose any terms on the particular assignee in favour of the wife. *Vide* Sir Edward Turner's case, 1 Vern. 7. Pitt v. Hunt, 1 Vern. 18. Tudor v. Samyne, 2 Vern. 270. Packer v. Wyndham, Prec. in Ch. 412. Walter v. Saunders, 1 Eq. Abr. 58. pl. 5. Bates v. Dandy, 1 Atk. 207. *Sed quære*, Whether in these cases of particular assignment any distinction has been made between a trust term and a chose en action of the wife?—*Vide* Pryor v. Hill, 4 Bro. Ch. Ca. 139. which was the case of a general assignment to creditors.—As to a particular assignment by the husband for a valuable consideration, *vide* Like v. Beresford, 3 Vef. jun. 506. *Vide* also Burdon v. Dean, 2 Vef. jun. 607. Ofwell v. Probert, 2 Vef. jun. 680. Brown v. Clarke, 3 Vef. jun. 166. Freeman v. Parsley, 3 Vef. jun. 421.

8. A. devises to his daughter 1000*l.*, payable at her age of twenty-one or marriage, and to his son 1500*l.* payable at twenty-four, with maintenance in the mean time; and his real estate he devises to trustee in trust to sell, if the personalty should fall short to pay the debts and legacies. A. dies, the son dies under age, and the daughter marries the defendant, who, with his wife, institute a suit in the spiritual court against the trustees (who are also executors) for the daughter's legacy, and for her brother's, as his representative; whereupon the executors file the present bill to stop the proceedings of the spiritual court, and compel the husband to settle the wife's legacy on her. On the question in this case, whether the court could interpose and secure the daughter's legacy to be settled on her (a), *Master of the Rolls* said this bill is of an unusual nature. It is the common

(a) *Vide* Jacobson v. Williams, 1 P. Wms. 382.

(b) *Vide* Miles v. Williams, 1 P. Wms. 249.

(c) Where a mortgagee in fee dies, though the heir takes the legal estate by descent, he is but a trustee for the executor.

Note; In Jewson v. Moulson, 2 Atk. 420. Lord Hardwicke expresses great doubt whether equity would interfere where the husband or his general assignees could get possession of the wife's property without the aid of the court; as to which *vide* Winch v. Page, Bunb. 86. Anon. Prec. in Ch. 543. Harrison v. Buckle, 1 Stra. 503.; but where the property is a subject of equitable cognizance, it is clear that the general assignees of the husband (whether by the operation of law or otherwise) are subject to the same equity as the husband, by whomsoever the application may be made. *Vide* Jacobson v. Williams, *ante*, and the cases there referred to. *Vide* Watson v. Mafcall, 1 P. Wms. 459. (n.) Saddington v. Kinsman, 1 Bro. Ch. Ca. 44. Wenman v. Mason,

M. 1720, cor. M. R. Harrison v. Buckle, 1 Stra. 233.

(a) There was another question in this case, whether the son's legacy was extinguished by his death before it became payable; which *see* *post*. tit. Legacy.

(a) In *Gardener v. Walker*, 1 Stra. 503. the husband brought a suit in the spiritual court for the wife's legacy, and the executor filed an injunction bill. Decreed the wife to be provided for, who-soever is the plaintiff.

Vide Jacobson v. Williams, 1 P. Wms. 383. *Milner v. Colmer*, 2 P. Wms. 639. *Adams v. Pierce*, 3 P. Wms. 11. *Brown v. Elton*, 3 P. Wms. 202. *Winch v. Page*, Bunb. 86. *Jewson v. Moulson*, 2 Atk. 420. *Attorney General v. Whorewood*, 1 Vef. 538. *Pryor v. Hill*, 4 Bro. Ch. Ca. 139.

M. 1721, in Scacc.

Winch v. Page, Bunb. 86.

Vide Thompson v. Attfield, 1 Vern. 40. where a defective voluntary conveyance was made good in equity for the benefit of children. *Vide Lupton v. Tempest*, 2 Vern. 626. where the Court of wife's fortune.

H. 1722, cor. Macclesfield, C. *Gardener v. Walker*, 1 Stra. 503. 1 Eq. Abr. 64. pl. 1.

Vide Anon. cited in *Nicholas v. Nicholas*, Prec. in Ch. 548. *Anon.* 1 Eq. Abr. 64. pl. 1. *Toth.* 114. S. C. *Winch v. Page*, Bunb. 86. *Harrison v. Buckle*, 1 Stra. 238. *Jewson v. Moulson*, 2 Atk. 420.

T. 1724, cor. Macclesfield, C. *Adams v. Pierce*, 3 P. Wms. 12.

Vide Jacobson v. Williams, 1 P. Wms. 382. *Bosvil v. Brander*, 1 P. Wms. 448. *Milner v. Colmer*, 2 P. Wms. 639.

common course of the court to oblige a husband (who sues in right of his wife for her property) to make a proper settlement on her. Had this been *res integra*, his Honor would have been very cautious how he went so far as legacies, because there is a proper court for recovery of them; they originally belonged to the spiritual court, and equity only interfered to discover the testator's personal estate (a). But here the persons liable to pay the legacies are the plaintiffs and not the husband, and whether they would be safe in paying the legacy, if they had suffered the spiritual court to go on to a sentence, his Honor would not say. This is something of the nature of an interpleading bill, wherein the executors call on the husband and wife to interplead concerning their several rights; the husband to the money, and the wife to a provision: and then it will be like the common cases of a husband coming into court to have his wife's legacy. Lord *Cowper* strongly inclined to do right to the wife. Since legatory causes are become part of the jurisdiction of Chancery, it is fit to be considered. Ordered the wife to attend and say what provision she is willing to accept.

9. The portion of a feme covert was secured in equity for the benefit of her and her children, where the husband applied for her fortune.

good in equity for the benefit of children. *Vide Lupton v. Tempest*, Chancery would impose terms on a man if he applied there for his

10. A considerable legacy was left to defendant's wife, for which he brought his suit in the spiritual court. The executor of the testator filed his bill, praying the direction of the court, and an injunction against the husband's proceeding in the spiritual court. The husband insisted that equity ought not to enjoin him or interfere, unless he had filed his bill in equity for the wife's legacy. *Sed per cur.*—The money must be applied for the wife's benefit, for whoever is the plaintiff does not alter the reason of the thing.

11. A. bequeathed to his two daughters 2000*l.* a-piece. The eldest married Dr. P., a clergyman possessed of great church preferment, who before marriage settled 99*l.* per ann. on his wife, and 1000*l.* part of her portion. The second married a freeman of London, and before marriage the father's executor assigned good part of her portion to trustees for her separate use, and to be at her disposal. At the time of their marriage both daughters

daughters were infants, and soon after an additional portion of 4000*l.*, consisting of leasehold estates, fell to them by the death of their brother. The executor brought a bill to pass his accounts, and prayed that the two husbands, in consideration of the additional portions, might make additional settlements on their wives, especially the citizen, who had made no settlement out of his own estate. *Per cur.*—Here the executor is plaintiff: had the husbands been plaintiffs, and had asked the aid of the court, it could only have been granted on such terms as appear reasonable. The daughters in this case have a legal interest in the leasehold estate, which the court cannot divest them of; had the acquisition been in money, the court could choose if the husbands should take it without making a further provision: but the clergyman has made a suitable provision, and is a man eminent in his character and function; and, as to the citizen, he is in great credit, and in a thriving way. The provision, which his wife will be entitled to under the custom of *London*, is a good provision. Decreed the executor to account with the husbands, and to be paid his costs.

In *Gardener v. Walker*, *ante*, Lord Macclesfield said, whosoever is plaintiff does not alter the reason of the thing.

12. A trader on marriage gives a bond to a trustee to secure 1000*l.* to the wife, if she survive him. The trader becomes a bankrupt. This debt shall not be allowed, nor any reservation made for it, nor shall it stop the distribution, in regard it may never be a debt (*a*). So within the same reason an obligee in a bottomree bond (*b*) shall not, before the return of the ship, come in under a commission of bankruptcy. But in either of these cases, if the contingency happens before the bankrupt's estate be fully distributed, such creditor shall come in for his proportion (*c*).

ment on bond forfeited at law before the bankruptcy. *Vide* *Ex parte Groome*, 1 Atk. 115. *Ex parte Winchester*, 1 Atk. 116. *Ex parte Mitchell*, 1 Atk. 120. *Ex parte Greenaway*, 1 Atk. 113. *Godard v. Vanderheyden*, 3 Wils. 271. *Hancock v. Entwistle*, 3 Term Rep. 435. Where the contingency upon which the money is made payable is the bankruptcy or insolvency of the debtor, such debt cannot be proved under his commission. *Ex parte Hill*, Cooke's B. L. 282.

(*b*) The case of an obligee in a bottomree or respondeat bond is now provided for, 19 Geo. 2. c. 32. s. 2.

(*c*) *Sed vide* *Ex parte Groome*, 1 Atk. 118. *contra*.

S. C. But in the case above-mentioned of the bond, the obligee, if he declares upon his bond only, shall be barred. *Secus*, if in his declaration he sets forth the condition as well as the bond.

" judgment; but he did *obiter* declare his opinion only. Lord Talbot afterwards doubted of Lord King's opinion; and in a case before me since, I have differed from him entirely, and see no reason to alter my opinion."

M. 1728; cor. King, C.
Ex parte Caswell, Canalet, and Bateman,
2 P. Wms. 497. 499.
Mof. 28. 79.

S. C. nomine Gazalot Ex parte.
Vide Holland v. Calliford,
2 Vern. 662.

Ex parte Bayley, cor. Macclesfield, in Hil. 1720.

(*a*) *Tully v. Sparks*, Raym. 1546. *Ex parte Jeffries*, 7 Vin. Abr. 72. pl. 7. *Ex parte King*, Dav. 254. *Hancock v. Entwistle*, 3 Term Rep. 435. *Secus*, where the provision is secured by a judgment

As to the case *Ex parte Caswell*, (2 P. Wms. 497.) Lord Hardwicke, in the case *Ex parte Groome*, 1 Atk. 118. said, " It is barely an opinion of Lord King, and not the case in

T. 1730, cor. M. R.
Hinton v. Scott, *Mof.* 337.

M. 1731, cor. King, C.
Milner v. Colmer,
2 P. Wms. 639. 641.
2 *Eq. Abr.* 146. pl. 4.

(a) In *Adams v. Pierce*, 3 P. Wms. 12. Lord Macclesfield thought the provision to which a widow was entitled under the custom was a good provision; and in *Frederick v. Frederick*, 1 P. Wms. 710. persons were ordered to take up their freedom, to the intent that their wives and children may be provided for by the custom.

(b) *Vide* *Jacobson v. Williams*, 1 P. Wms. 382. *Bosvil v. Brander*, 1 P. Wms. 458. *Winch v. Page*, Bunb. 86. *Harrison v. Buckle*, 1 *Str.* 239.

(c) *Adams v. Pierce*, 3 P. Wms. 12. *Willatts v. Cay*, 2 *Atk.* 67. *Ex parte Higham*, 2 *Ves.* 579.

M. 1733, cor. King, C.
On appeal from the Rolls,
Brown & Ux v. Elton,
3 P. Wms. 202.
2 *Eq. Abr.* 241. pl. 29.

13. The baron in poor circumstances, and his wife wholly unprovided for, settles her orphanage part in trust for her sole and separate use. His creditors, prior to the assignment, shall not set it aside, or have the interest of the money during his life, for it is a reasonable settlement, and such as the court would have obliged the husband to make, if he had filed a bill for her orphanage share.

14. A freeman of *London* (in good trade) married an infant entitled to a great personal estate, pending a bill for an account of such estate, and then applied to the court for his wife's portion; whereupon he was directed to make proposals before the Master. The husband offered to settle 4000*l.* part of his wife's fortune (the whole being 14,000*l.*) on her and the issue of the marriage, and 500*l.* per annum more on his wife for a jointure, out of the family estate, if his elder brother should die in his lifetime without issue male, alleging that his children would be amply provided for by the custom (a) at his death, which it was contended was a very considerable ingredient. Objected, that a freeman's personal estate is precarious, and subject to great miscarriages, and that the wife's portion should be invested in lands, or settled (b). Lord Chancellor thought it extraordinary that the court should interpose in cases where the law gives him a title to the wife's personal estate; and unless the husband was profligate or extravagant, such interpositions had been the occasion of mischief rather than good. His Lordship then examined the wife in court as to her consent, which she freely gave. His Lordship said, the covenant to make a jointure of 500*l.* per annum when in possession of the family estate was to be considered and valued; and therefore decreed, that on the husband's entering into such covenant, and making the settlement by him proposed, the residue of the wife's portion should be paid over to him (c).

15. *B.* married a young lady who had a legacy of 400*l.* payable at her marriage, but he made no settlement on her. *B.* demanded the legacy, which the executor refused to pay unless *B.* made some provision for his wife, which he refused to do. Bill by the husband and wife for this legacy. The executor by his answer offered to pay the legacy on the terms suggested. Master of the Rolls ordered the plaintiff to make proposals before a Master, and to pay

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pay all costs in regard of the executor's offer. On appeal Lord Chancellor said, that as the practice of the court was to enforce a husband to make a settlement, before he recovers by the aid of equity (a) his wife's portion, he should not alter it, though it seems to break in on the legal title (b) of the husband to the wife's personal estate, and has sometimes proved inconvenient; yet his Lordship reversed that part of his Honor's decree which saddled the plaintiff with all costs. His Lordship would not condemn a man to pay costs for insisting on a right which the law gives him. Decreed no costs on either side (c), but as plaintiff now offers to make a settlement on his wife, that must be at his own charge.

(a) *Vide Harrison v. Buckle*, 1 Stra. 239. *Milner v. Colmer*, 2 P. Wms. 639. *Adams v. Pierce*, 3 P. Wms. 11. *Jewson v. Moulson*, 2 Atk. 420. *Attorney-General v. Whorewood*, 1 Vef. 538. *Jacobson v. Williams*, 1 P. Wms. 383.

(b) *Vide Milner v. Colmer*.

(c) Mr. Cox, in his note, says, *Quere* the equity of this decree, whereby the executor was to pay costs out of his own pocket (that being the consequence of ordering no costs on either side) for a conduct which the court itself has ever approved?

16. Whenever a man marries a ward of the court without the consent of the court, he shall have no benefit of the portion till he makes a suitable settlement.

M. 1739, Cane.
Phippi v. Sheldon, MS. note,
1 Eq. Abr. 64. pl. 1.

17. The petitioner's husband before marriage gave her father a bond in the penalty of 600*l.*, conditioned for the payment of 300*l.* to her in case she survived. The husband has a commission of bankruptcy taken out against him, and dies ten days after. The court thinking it a doubtful case whether she should or should not be admitted a creditor, did not give an absolute opinion; but on the assignees consenting she should come under the commission for 150*l.*, ordered her a dividend accordingly.

23 Dec. 1740, cor. Hardw. C.
Ex parte Greenway, 1 Atk. 113.
Vide Holland v. Calliford,
2 Vern. 662.

S. C. The statute of 7 Geo. 1. c. 31. extends only to creditors at a future day certain, and not to debts on mere contingencies, which have not happened at the time of the act of bankruptcy committed.

Vide Ex parte Caswell, *Ex parte Cazalet*, *Ex parte Bateman*, 2 P. Wms. 497.

All the cases since *Tully v. Sparks*, 2 Raym. 1546. have been determined against a contingent interest.

18. The wife has a rent charge devised to her for life, issuing out of a freehold estate. The husband during the coverture may have a legal remedy by distress for the arrears, but he cannot convey it away to her prejudice, for if she survives she will have her rent charge again.

22 Feb. 1742, cor. Hardw. C.
Fitzer v. Fitzer and another,
2 Atk. 511.

The court will not hinder the husband of his legal remedy by distress till he has made some provision for his wife, any more than they would do it where

where a man marries a woman seised of lands in fee.

Vide Jewson v. Moulson,
2 Atk. 417.

Even in the cases of bankrupts, the court have not determined that creditors are not entitled to the interest of the husband during his life in the wife's *chofes en action*, but have recommended it to them to allow the wife a provision, and take the rest to themselves.

27 Oct. 1742, cor. Hardw. C.
Jewson v. Moulson,
2 Atk. 417 to 423.

Note; The rule in equity seems to be, not to suffer the husband to take the wife's portion until he has made a reasonable provision for her; and this is not a new doctrine, for Lord Coventry takes notice of it in *Tanfield v. Davenport*, 14 Car. 1. In *Toth.* Lord Hardwicke says, it is difficult to reconcile the cases on this head, though one thing is clear through them all, that if the husband makes a voluntary assignment of the wife's portion, the volunteer must stand in the husband's place. There is the same equity too in regard to executors and administrators, and the same as to assignees of bankrupts, for it is the law that casts it upon them. *Vide Burnet v. Kinafton*, 2 Vern. 401. *Taylor and Wheeler*, 2 Vern. 564. *Jacobson v. Williams*, 1 P. Wms. 382.—In the last case Lord Cowper thought commissioners of bankrupt could not assign a possibility, but he was clearly wrong in point of law, for not only the latter statutes relating to bankrupts mention the word *possibility*, but 13 Eliz. c. 7. f. 2. empowers the commissioners to assign all that the bankrupt might *depart with*; and, besides, 21 Jac. 1. c. 19. enacts that the statutes relating to bankrupts shall be construed in the most beneficial manner for creditors, *vide Higden v. Williamson*, 3 P. Wms. 132. And in equity it is now well known that a possibility may be both released and assigned, and it was so determined in *Watson v. Mascall*, 19 Mar. 1732, upon the authority of the last-mentioned case. Yet where the husband assigns the wife's trust of a term for a valuable consideration, the assignee need not make a provision before he is entitled. *Tudor v. Samyne*, 2 Vern. 270.—in *Walters v. Saunders*, 1 Eq. Abr. 58. *Bosvil and Brander*, 1 P. Wms. 458. and *Dates and Dandy*, 2 Atk. 207. the particular contract of the husband for a valuable consideration has got the better of the wife's equity to have a provision. In *Sir Ed. Turner's case*, 1 Vern. 7. it was said that the same rule of property must prevail in equity as at law; and as at law a husband could dispose of a term for years, so he may dispose of the trust of a term; but in *Pitt v. Hunt*, 1 Vern. 18. Lord Nottingham expressed great surprise at this resolution.

The case of *Jewson and Moulson* differs from the foregoing cases; the wife in that case being an infant, and the husband having there assigned over all her fortune to his creditors, though he could not reduce it into possession without the assistance of the court; if that were allowed, it would defeat the protection of the court with regard to infants.——A court of equity will not interrupt the legal title of the husband to the property of the wife, unless called upon by the husband to lend him its assistance in respect to such property, *vide Milner v. Colmer*, 2 P. Wms. 619. *Adams v. Pierce*, 3 P. Wms. 11. *Willats v. Cay*, 2 Atk. 67. But if he ask for equity, he must do equity by providing for the wife.

Browne

19. *V.* a trader married the daughter of *B.*, who had a fortune of 600 *l.*, but he made no settlement on her. *V.* being indebted to defendant in 500 *l.*, made an assignment to him of his wife's fortune, (which had not been paid over by her father's executors,) and soon after made a second assignment thereof to trustees for the benefit of his creditors in general. The wife was under age, and had two children. The husband afterwards became bankrupt. The question in this case was, whether the wife, who was wholly unprovided for, should not have a maintenance secured to her out of her share of her father's personal estate (which amounted to 600 *l.*) before it was applied in payment of defendant's debts, or divided among the creditors generally. Lord *Hardwicke* was of opinion not to permit the defendant to receive the fortune of *V.*'s wife without making some provision for her, and recommended it to him to give her and her children some part of the principal of her fortune; and afterwards on 6th December 1742 Lord *Hardwicke* decreed, (in consequence of an agreement between the parties,) that a moiety of the wife's fortune should be placed out for her separate use during her life, and after her death to be paid to her children in equal shares.

Browne and Elton, 3 P. Wms. 202. If the husband become bankrupt, all such property of the wife as he could assign or release passes by the commissioner's assignment. Miles v. Williams, 1 P. Wms. 251. But the assignees take it subject to the same equity of providing for the wife. Bosvil v. Brander, 1 P. Wms. 458. Ex parte Coytgame, 1 Atk. 192. Grey v. Kentish, 1 Atk. 280. and 1 P. Wms. 459. (n). Worral v. Marlar, and Busnal v. Pell, *ibid.* As to the case of a particular assignee of the husband for a valuable consideration, *vide* Bosvil v. Brander, 1 P. Wms. 458. Pryor v. Hill, 4 Bro. Ch. Ca. 139. Like v. Beresford, 3 Vef. jun. 506. *Vide* Burdon v. Dean, 2 Vef. jun. 607. Oswell v. Probert, 2 Vef. jun. 680. Brown v. Clarke, 3 Vef. jun. 166. Freeman v. Parsley, 3 Vef. jun. 421.—As to voluntary assignment, *vide* Squib and Wyn, 1 P. Wms. 381.

20. The wife's portion has in some cases been decreed to the husband, (though he has not made a settlement adequate to it,) where the settlement was before marriage; otherwise on a voluntary settlement after marriage.

13 Nov. 1742, cor. Hardw. C.
Lanoy v. Duke and Dubeft of
Atbol, 2 Atk. 448.

21. A legacy of 500 *l.* was given under the will of *A.* to *B.* before her marriage with the plaintiff, who though he had received 2000 *l.* from other parts of his wife's fortune, refused to make any provision for her; whereupon the executor of *A.* would not pay the legacy; and the husband in 1734 bringing his bill for it, the court referred it to a Master to receive proposals from the husband for a provision for the wife, and on the Master's certificate that the husband never had made any proposals, the court directed the 500 *l.* to be laid out in *South-Sea* annuities for the benefit of the husband and wife, subject to the further directions of the court. The dividends of the money so invested now amounted to 122 *l.*, and the husband being dead, his executor claimed it as the wife's *chose en action*, which had vested in the husband by the decree for investing the same. On a petition by the wife, Lord Chancellor thought, if this legacy had been *all* the wife's portion, the husband would have been entitled to the interest for her maintenance; but where a husband has received a great part of his wife's fortune, and only a small part remains, and the husband will not make a competent settlement, the court will not only stop him from receiving the residue of her fortune, but will deny him the interest of that residue, that it may accumulate for the benefit of the wife, unless he is starving for want of maintenance.

21 Jan. 1743, cor. Hardw. C.
Bond v. Simmons, 3 Atk. 20.

22. *J. G.*, previous to the marriage of the petitioner and his daughter, by bond became bound to the petitioner in 2000 *l.*, conditioned as follows: "That if the marriage took effect, and if the heirs, &c. of *J. G.* should, at the expiration of twelve months after the death of the survivor of the said *J. G.* and *B.* his wife, pay unto the

20 Oct. 1744, cor. Hardw. C.
Ex parte Winchester, 9 Mod. 471.
Vide next case, *Ex parte*
Groom, 1 Atk. 115. determined
differently by Lord Hardwicke on
same day under other considera-
tions.

"petitioner,

"petitioner, his executors, &c. 1000 l.; and also
 "if the said J. G., his heirs, &c. should, until the
 "1000 l. became due and was paid, pay unto the
 "petitioner, his executors, &c. interest for the
 "same at the rate of 4 l. per cent. half-yearly on
 "Christmas and Midsummer days in every year,
 "the first payment to be, &c., that then, &c."

By articles bearing even date with the bond, this money was to be laid out at interest, and the interest to be paid to the husband for life, then to the wife, and then the principal to be divided among his children as therein mentioned. J. G. the father paid all the interest up to Christmas last, but none of the payments were made precisely on the day they became due, but some days after. Before Midsummer no interest being due on the bond, the father became a bankrupt; and now the petitioner prayed to be admitted a creditor under the commission for the 1000 l. so secured. It was urged for the assignees, that no action could be brought on this bond at the time of the bankruptcy, and therefore it was no debt; and that the interest accrued at Midsummer since the bankruptcy, could not entitle the petitioner to be let in. And that though an action lay at common law upon non-payment of the money at the day in the condition, even though it was paid at a day after, yet now by 4 & 5 Ann. c. 16. § 12. money paid after the day might be pleaded in bar as well as at the day, provided it was paid before the action was brought; so that this case was within the act; and consequently as no action could be brought, no debt was due. But Lord Hardwicke, considering the act as applicable only to bonds payable at a certain day and place, and this a bond payable as to the interest at several days, and as to the principal at a day future and uncertain, and therefore not within the words or intent of the act; and that the penalty might have been recovered at law before the bankruptcy; ordered the petitioner to be admitted a creditor for principal and interest, and that the dividend he should receive, to be laid out according to the articles; and said, this court will relieve the assignees only upon equity being done according to the condition.

In Tully and Sparks, 2 Raym. 156. there were two contingencies; and as both had not happened at the time of the act of bankruptcy, it being uncertain whether the bond would ever become due or not, it was impossible to make such abatement of 5 per cent. as the act directs; and therefore Cur. B. R. were of opinion the bond was not within stat. 7 G. 1.

20 Oct. 1744, cor. Hardw. C.
Ex parte Groom;
 1 Alk. 115. 118, 119.

Note; Lord Hardwicke, on hearing the petitions *Ex parte* Winchester and *Ex parte* Groome,

23. A husband by articles previous to marriage covenants to leave his wife 600 l. in case she survives him; he becomes a bankrupt, and dies before any dividend made; the wife, as the law now stands,

stands, cannot be admitted a creditor under a commission against the husband.

A bond payable by instalments, the obligee upon a breach of payment of the first instalment, gets judgment for the whole penalty. On payment of the money due and costs, even a court of law will act equitably, and relieve the obligor.

The case *Ex parte Caswell*, 2 P. Wms. 497. was an obiter opinion of Lord King only, and not the case in judgment.

A. a debtor to a bankrupt before his bankruptcy, and creditor to him upon a contingency that takes place after the bankruptcy, shall not be at liberty to set off under the clause relating to mutual credits.

to go upon niceties, but in that there was no remedy at law before the bankruptcy or commission, and therefore the petitioner could not be admitted a creditor. Lord Hardwicke added, that the case of Groome might have many hardships, but he could not, as the law stood, determine otherwise. His lordship hoped, however, that some gentleman who heard him would think of a clause by way of amendment to the last bankrupt act, which might remedy and settle the points before his lordship for the future.

said, these are cases of some value, more often of hardship and compassion. Many cases have arisen on this point. The two principal cases fall under very different considerations. In Winchester's case, the father gave a bond to the husband to pay him 1000*l.* after the death of himself and wife, with interest in the mean time. How can the party be relieved against the penalty but by paying what is in conscience due out of the estate? In that case there was a breach of the condition before the bankruptcy, for the interest was not paid, and the penalty was forfeited at law.—In Groome's case, Lord Hardwicke was sorry

24. A woman who had 1000*l.* to her fortune, and no other provision under articles before marriage than only a covenant from the husband, that he would consider himself as a freeman of London, and that if she survived him, she should have the widow's share. Upon her father's death she became entitled to 1800*l.* more, and living apart from her husband, she applied for a further provision. The court, from the care it takes of the interest of femes covert, will, upon accession of fortune to the wife, oblige the husband to make a further provision.

31 July 1749, cor. Hardw. C.
March v. Head, 3 Atk. 720.

25. A wife having a contingent interest under a bond given by her husband on marriage, but no judgment being entered up, nor any trustee added for her, had also a lease of the Cornmeters'-office left her by her father, whose executor would not assent to the husband's sale of it unless he made a further provision for her; but on a meeting with her friends she agrees, that upon settling part of the money arising from the sale for her separate use during her husband's life, and afterwards for the children of the marriage, she will part with her interest under the bond; the other part of the money to go to the husband, who becomes a bankrupt. Bill by the assignees to subject the wife's separate property. *Per cur.*—If the father had acted more cautiously, and had created trustees,

26 July 1750, cor. Hardw. C.
Ward v. Shallett, 2 Ves. 16.

In Hulme and Tenant, 1 Bro. Ch. Ca. 16. Lord Thurlow said, there must be trustees, otherwise a wife can have no separate property.

the court would not have suffered the husband to take the property without making a further provision, if she insisted on it. The father did not do so, but his executor acted reasonably. It is true, the husband could have compelled the executor's assent to the legacy, and in that case perhaps the court could not have put terms on the husband. Here is a clear consideration arising from the wife and her friends; the parting with her contingent interest under the bond, and the wife insisting on the benefit of it, is barred from any claim under the bond, for it is a transaction between husband and wife with the privity of her friends (a). If this is a consideration, it takes it out of all the statutes. To bring it within the statute of *Elizabeth* in respect of creditors it must be proved, that the husband was indebted at the time of the act (b), the contrary of which rather appears here. The statutes of bankruptcy do not extend to cases where there is a consideration. If a husband receives a new portion with his wife, and in consideration of it makes a new settlement which is adequate, it is good against creditors if no fraud appears. In this case the wife had no judgment, and could not have come in as a creditor under her husband's commission. There is nothing unreasonable in the settlement; it was a proper act for the wife and her friends to do, and it was done without a view to the bankruptcy. Bill dismissed so far as it seeks to impeach and set aside this deed, but with liberty for the assignees to apply in case that contingency happens on which the husband would be entitled. No costs on either side.

(a) *Theobald v. Duffay*, 9 Mod. 101. is a very strong authority, where the wife was barred of a possibility by such an agreement, and claiming the benefit of it.

(b) As in *Townsend v. Windham*, 2 Ves 1.

2 Aug. 1750, cor. Hardw. C.
Attorney-General v. Woodcock,
1 Ves. 538.

2 Dec. 1751, cor. Hardw. C.
Ex parte *Elizabeth Mitchell*,
1 Atk. 120, 121.
Ex parte *Catwell*, 2 P. Wms 497.
Ex parte *Greenaway*, 1 Atk. 113.

26. If a husband can lay hold of his wife's estate without the aid of equity, he is not compellable to make a settlement on her; but if he cannot get at it without the assistance of the court, he must make a suitable provision for his wife.

27. *B. M.*, in pursuance of articles before marriage with the petitioner, executed a bond to *T. M.* and *W. R.*, trustees under the articles, in the penalty of 1000*l.*, conditioned to be void if the heirs, &c. of *B. M.* should pay to *T. M.* and *W. R.* 500*l.* within three months next after the death of *B. M.*, for the use of the petitioner; or in case she should not survive, to the use of her child or children, if any. A commission of bankruptcy issues against *B. M.*, who dies on the 1st of

April

April 1749. On the 28th of the same month a dividend is made of 9s. in the pound. The petitioner prayed to be paid a proportionable dividend. The assignees being served with notice, and no counsel attending for them, the court directed she should be admitted a creditor, and receive a dividend of 9s. in the pound, *not being opposed.*

A judgment would have made it an immediate debt, and she would have been entitled to have come in as a claimant before her husband's death, and assignees must then have retained sufficient on a dividend-day to answer a proportionable dividend to the petitioner when the event happened.

Lord Chancellor King's being an *obiter* opinion as to a wife's being admitted to a dividend, and Lord Talbot doubting of it, and the present Chancellor in a case *Ex parte Groome, December 1741*, refusing to admit such a person creditor, his lordship would not suffer the secretary to draw up the order pronounced at a former day of petitions, though not defended, but recommended it to the assignees to compromise it with the petitioner.

28. A bond given to A. in trust to secure the payment of an annuity of 40*l. per annum* during the joint lives of Sir Edward Smith and petitioner, the bankrupt's wife; he delivers up the bond upon his last examination; she applies to the court, and prays the assignee may deliver the bond to her trustee, and that the arrears of the annuity, and all future payments, may be made to her. Lord Chancellor ordered it accordingly, considering the creditors as standing in the husband's place, and not more entitled than he would have been without making a provision for her.

29. Testatrix bequeathed "To her cousin A. B. "700*l. South-Sea* annuities; but if she happen to "marry again, she gave the same to G. R." It was said on behalf of A. B., that testatrix proceeded on a supposition that A. B. was a widow, whereas, in fact, she was married unhappily: her husband had embezzled a part of her fortune and gone abroad, and she had no maintenance from him, and therefore it was contended the legacy should be paid to her separate use without the intermeddling of the husband. *Per* Master of the Rolls.—If a proper case was laid to warrant what is insisted on, the court would, without difficulty, protect the wife's property from the husband. In

C c 2

general,

Lord Hardwicke said that his opinion *casti Ex parte Groome* was founded on Tully and Sparks in B. R., and that the only difference between the principal case and *Ex parte Groome* was, that *Groome's* case was on contract and this on bond.

22 Jan. 1752. S. C. 121.

22 Jan. 1753, cor. Hardw. C. *Ex parte Coysegame*, 1 Atk. 192.

It appeared, that the bankrupt's wife brought him a portion of 500*l.* and had nothing to subsist upon but this annuity.

29 July 1754, cor. M. R. *Sleech v. Thurington*, 2 Ves. 560.

general, if a husband comes into court for any thing he claims *jure mariti*, he must submit to the terms of the court, and make a reasonable settlement. Various instances have been where the wife has insisted the husband should have nothing; but the court has not deprived the husband of the wife's fortune so long as he lives with her and maintains her; and there is no reason for their living apart. Even where the husband will not go before the Master, the court will not diminish his right so as to take from him the produce, but constantly, where he maintains his wife, the court will direct the interest to be paid to him. *Secus* where he leaves her unprovided, as in *Colmer v. Colmer* (a), *cor. Lord King*; but particularly *Watkins v. Watkins* (b), where, as in this case, the husband was gone abroad, and had left his wife unprovided for, the court laid hands on the money which was in the power of the court, and directed payment of the interest to the wife until the husband returned and maintained her. Here no one appears for the husband: the wife is a defendant, and her answer is not replied to; so no proof can be of the husband's being abroad to warrant such immediate directions. His Honor directed the Master to inquire whether the wife had been deserted by her husband without a maintenance, and whether he had made any and what settlement on her; and in the mean time the money will be in the power of the court, subject to further order.

(a) *Mof. 113. 118.*

(b) *2 Atk. 96.*

8 Aug. 1754, *cor. Hardw. C.*
Ex parte Higbam, 2 *Vej.* 579.

30. Husband petitions that his wife's fortune near 1000*l.* should be paid to him out of the Bank. They had been married about half a year. The wife was lately come of age, and being in court, was very desirous it should be so; and the husband said he could make more of it in his trade of a trunkmaker than to make any settlement on his family. Lord Chancellor said he might do so, but he might also spend it. Decreed 400*l.*, part of the portion, to be settled on his wife and family.

27 June 1755, *cor. Hardw. C.*
Tomlins v. Ladbroke,
2 *Vej.* 592. 595.

(a) *Vide Cox v. Belitha*, 2 *P. Wms.* 272.

(b) *Vide Merewether v. Heiter*,
7 *Vin. Abr.* 209. pl. 18. 2 *Eq. Abr.* 267. pl. 15.

31. A settlement to the separate use of a free-man's daughter is an advancement as between the children, and shall be brought into hotchpot (a); but her husband may be relieved against it if he does not acquiesce (b), yet he must make a reasonable settlement.

Where

§9. *Feme's Provision secured in Equity.*

B—a 389

Where a great acquisition comes to the wife after marriage, the court will not suffer the husband to exhaust the greatest part of her estate, notwithstanding he may have made a former settlement on her.

32. Petition by the husband and wife that her personal estate, amounting to about 3000*l.*, should be paid to him out of court, the wife consenting thereto, and proposals being made for a settlement; but the court would not grant it, there being a possibility of issue, and nobody to consent for children, and the husband, who was in *Jamaica*, might die before he came home.

28 July 1755, cor. Hardw. C.
Ann. 2 Ves. 672.

33. This court will decree money to the husband and wife where a proper settlement is made, but not to the husband alone; for it is intended, that if the husband does not receive it, it shall survive to the wife: but where the wife has not had a sufficient settlement, the court will not even make such a decree.

28 July 1755, cor. Hardw. C.
Pawlett v. Delaval, 2 Ves. 669.

34. A wife entitled to a sum of money died in her husband's lifetime, leaving children. *Quere*, If the husband is entitled to the money without making a settlement on the children? *Per cur.*—The compelling of settlements first arose on the husband's going into equity for assistance. It is personal to the woman, and would prejudice creditors if carried further.

8 July 1765, cor. Northington, C.
on appeal from the Rolls.
Scriven v. Tapley, Amb. 509.

35. A wife was entitled to a distributive share of an intestate's estate. The court took it into consideration, whether they should order the money to be paid to the husband or settled on the wife. Upon reference to the Master he certified, that, by the laws of *Prussia*, of which they were inhabitants, the whole personalty of the husband and wife is absolutely at his disposal during the coverture; but on the death of either it is divided between the survivor and the heirs of the deceased. The wife made no application to the court to have it settled, or otherwise. The court inquired what was the custom of *London* in such case, and then ordered the money to be paid to the husband.

T. 1792, in Scacc.
Sawyer v. Skute, 1 Anst. 63.
Vide French v. Campbell,
3 Vef. jun. 321.

Note; It would be very difficult to direct any mode of settlement which might not be done away by the Prussian laws.

36. A feme covert being entitled to the interest of money in the funds for life, her husband makes a general assignment for the benefit of his creditors. The assignees shall not take the dividends

M. 1792, cor. M. R.
Pryor v. Hill, 4 Bro. Cb. Ca. 139.
Vide Ex parte Coyssegame,
1 Atk. 192. and 1 Cooke's Bankrupt Laws, 323.

without making a provision for the wife. His Honor however referred it to a Master, in order that the assignees might make an offer.

T. 1793, cor. Loughb. C.
Ball v. Montgomery and another,
 4 Bro. Ch. Ca. 339.
 3 Ves. jun. 191.

Lord Chancellor would not decide upon the eventual right of the husband in this case. The fund is intended for the maintenance of both; therefore the whole cannot be paid to the wife to maintain her in adultery, neither can the whole be paid to the husband on account of the wife's interest, and she must not be reduced to beggary. The payment of the future dividends into court may lead to an agreement to provide for the wife. His lordship therefore retained the bill.

29, 30 June 1795, cor. M. R.
Burton v. Dean, 2 Ves. jun. 607.

(a) The wife's counsel in this case pressed for a settlement of all her property; but his Honor said it would be impossible to give it her, for that would admit that a married woman is entitled to the whole of her property for her separate use.

27 July 1795, cor. Loughb. C.
Oswell v. Probert, 2 Ves. jun. 680.

(a) *Vide* *Ball v. Montgomery*,
 3 Ves. jun. 191.

The court was pressed on this occasion to determine the proportion that should be settled on the wife, as in *Worrall Marler*, 1 P. Wms. 459, 460. (n.) where the fund was divided; but Ld. Chancellor said that was a sum of mo-

37. There was a settlement on the marriage of husband and wife of the wife's fortune, but no provision made for payment of the interest during coverture. She left her husband's house, and afterwards lived in adultery. On bill filed by the husband to be paid the dividends, the court would not decree payment without a provision for the wife; but ordered the future dividends to be paid into court, and the costs out of the accumulated dividends.

38. The assignees of a bankrupt must make a provision for his wife out of (a) all her property, which cannot be obtained without the aid of equity, and a settlement before marriage of part of her property to her separate use does not bar her; for this equity of the wife attaches upon all newly-acquired property, or rather a new equity arises.

39. Devise to the use of A. and her issue in strict settlement, subject to a trust for payment of debts and legacies, and to pay certain annuities out of the rents and profits, with power to sell. A. married a man who became bankrupt. Bill by the executors of a mortgagee of one of the estates against the trustees. Upon which it was decreed that the estates should be sold, and the money funded. The cause coming on for further directions, the question was, if the bankrupt's assignees must make a provision for the wife out of the dividends claimed in her right? One of the annuitants was living. *Per. cur.*—Whatever the husband takes in right of his wife is in itself a provision for both (a), by a title that gives them a joint enjoyment. If he does not support her, he cannot have the whole: the assignees here come in right of a husband not maintaining his wife. The trustees had a power to sell, or the court could not have sold the estate. This court cannot interfere upon the favour due to the wife from any person claiming by legal title from the husband; but where persons are obliged to fly to an equitable jurisdiction the wife cannot be permitted to starve. Decreed

creed that the dividends of the funded property belong to the wife for life, and that proposals for a provision be laid before the Master.

is better to refer it to creditors; they are extremely handsome on these occasions.—*Kide Pringle v. Hodgson*, 3 Vef. jun. 619.

ney. It is easy to divide a sum of money, but not so easy to divide an income; for half an income is not a maintenance. It

these occasions.—*Kide Pringle v.*

40. A husband married a ward of the court without consent, for which he was committed; but being in the army, he was discharged on undertaking to make a proper settlement. The husband then applied for the wife's whole fortune, alledging that his wife would consent in court (a); but Lord Chancellor would not permit it, and said, if he refused to make the settlement he would send him back to the *Fleet*.

15 Ap. 1796, cor. Loughb. C.

Stackpole v. Beaumont,

3 Vef. jun. 89. 98.

(a) It is to be observed, that in this case the wife was under the protection of the court, and that the marriage was a contempt; the court therefore are not bound, though the wife should persist in her consent to the husband having her fortune, as in

Dimmock v. Atkinson, 3 Bro. Ch. Ca. 195.

41. The assignees of a bankrupt taking his wife's fortune out of the court must make a provision for her. They consented to give her half in this case.

T. 1796, cor. M. R.

Brown v. Clark,

Hoffman v. Clark,

3 Vef. jun. 166.

42. The assignees of a bankrupt were made defendants in respect of an interest which the bankrupt's wife had under a will, and they claimed the wife's share. They cannot take it, but subject to a provision to be made for her.

T. 1797, cor. Loughb. C.

Freeman v. Parsley,

3 Vef. jun. 421.

Vide Burdon v. Dean, Oswell v. Probert, 2 Vef. jun. 607. 680.

43. A settlement made after marriage of stock standing in the name of the wife before, and at the time of the marriage as her fortune. The husband being insolvent at the time, and soon after becoming a bankrupt, the same was set aside as fraudulent against creditors upon a bill by the assignees after the death of the husband. The stock did not survive; but decreed to the assignees, subject to a provision out of it to the widow.

27 Feb. 1798, cor. Loughb. C.

Pringle v. Hodgson,

3 Vef. jun. 617.

Note; The rule in equity seems to be, not to suffer the husband to take the wife's portion until he has made a reasonable provision for her; and the same equity exists in regard to the assignees of a bankrupt husband, who stand exactly in the husband's place.

Vide Burnet v. Kinston, 2 Vern.

401. *Taylor and Wheeler*,

2 Vern. 564. *Jacobson v. Wil-*

liams, 1 P. Wms. 382.—In the

last case Lord Cowper thought

Assignees of a bankrupt may recover in an action against the Bank, stock standing in the name of the wife.

commissioners of bankrupt could not assign a possibility; but he was clearly wrong in point of law, for not only the latter statutes relating to bankrupts mention the word *possibility*, but 13 Eliz. c. 7. §. 2. empowers the commissioners to assign all that the bankrupt might *depart with*, and, besides, the 21 Jac. 1. c. 19. enacts, that the statutes relating to creditors shall be expounded in the most beneficial manner for creditors. *Vide Higden v. Williamson*, 3 P. Wms. 132. which case (said the Master of the Rolls in *Moth v. Frome*, Amb. 394.) was the occasion of the statute 5 G. 2. *Vide etiam Moth and Frome*, where his Honor has clearly laid down, that the sort of possibility assignable by commissioners of bankrupt, and intended by 5 G. 2. to pass by their assignment, is such a one as can be disclosed by the bankrupt on his last examination, and where *persona designata est*. The doctrine, however, on this subject now seems clear, that equity will not interrupt the legal title of the husband to his wife's property, unless called upon by the husband or those claiming under him for its aid in respect to such property, in which case equity will impose terms on him or them, by compelling him or them to provide for the wife. *Vide Brown v. Elton*, 3 P. Wms. 202. So if the husband become bankrupt all such property as he could assign or release passes by the commissioners assignment. *Vide Miles v. Williams*, 1 P. Wms. 241. but the assignees take it, subject to the same equity of providing for the wife. *Vide Bouville and Blandier*, 1 P. Wms. 459. where Mr. Cox has industriously collected all the authorities on this subject as reviewed by Lord Thurlow in *Worral and Mear*. *Vide also Jewton and Moulton*, ante, and notes.

Sec. 10. Cases in which a Wife shall have her Election when two Provisions are in her View.

T. 1705, Canc.
Perry v. Perry, 2 Vern. 505.
 1 Eq. Abr. 203. pl. 4.

1. *A.* On his marriage covenants to purchase and settle 20 *l.* *per ann.* on his wife for her life, and if he died before it was done, to leave her 300 *l.* out of his personal estate for her better livelihood. He died without making any settlement, and by will gave her the interest of 330 *l.* for life, with a power to dispose of 30 *l.* at her death. Decreed the wife was entitled to the 300 *l.* and interest by the articles, and that the executors were not at liberty to settle 20 *l.* *per ann.* on her for her life, and that the legacy was not a satisfaction of the articles; but that she should have the 300 *l.* by the articles and the legacy too.

H. 1707, Canc.
Hancock v. Hancock, 2 Vern. 605.
 1 Eq. Abr. 153. pl. 8.
Gilb. Eq. Rep. 95. S. C. but it seems on a former suit.

2. A man on his marriage covenants to purchase and settle lands of 400 *l.* *per ann.* to the use of himself for life, then to his wife for life, remainder to the heirs of their two bodies; and if he should die before a settlement was made, that then the wife might elect either to have the 400 *l.* *per ann.* or 3000 *l.* in money in lieu of dower. The husband dies without making a settlement. On a bill by the creditors the wife elects the 3000 *l.*, and the children insist on having a settlement made according to the articles expectant on their mother's death, by which means all the assets would be exhausted. Decreed a settlement to be made on the wife for life, remainder to the children *nunc pro tunc*, notwithstanding her election.

T. 1708, cor. Cowper, C.
Webster v. Milford,
 2 Eq. Abr. 362. pl. 11.

3. *A.* by marriage articles engages himself to leave his wife a moiety of his personal estate at his death, and being possessed of an annuity in the Exchequer, disposed of it by deed-poll in his lifetime. Afterwards he made his will, and thereby devised to his wife certain lands for life, upon condition that she should not make any demand upon the articles against his executor, and after her decease devised the lands to *B.*, and gives several legacies, and dies. The wife waives the devise, and insists upon the articles. The question was, whether the wife should have one moiety of the personal estate which the husband had at the time he entered into the articles, or only a moiety of the personal estate he died

died possessed of? *Per* Lord Chancellor.—The annuity must be accounted part of the personal estate the wife is to have a moiety of; for were she but to have a moiety of the personal estate the husband should leave at his death, it would be in the power of him to defeat the articles by alienation or gift. The reason of inserting *at his death*, was to explain he meant only a moiety of his estate at his death which has escaped misfortunes and losses.

4. By marriage articles it was covenanted, that the intended husband, if his wife survived him, should secure to her the value of half her fortune, to be at her disposal. The marriage took effect, but the husband never altered the nature of the securities; but by his will gave his wife more than she could claim under the marriage agreement. The rest he disposed of in other legacies, and died. *Per cur.*—The legacy to the wife shall be taken *to be in pursuance* of the agreement, and shall *discharge it*; but if it be more beneficial to the wife to claim under the agreement than under the will she shall have her election.

5. A man has one daughter to whom 8000 *l.* is secured by his marriage settlement. Afterwards he gives her 8000 *l.* by will for her portion, and 200 *l.* *per ann.* She can have but one 8000 *l.* (a), though she may, when she comes of age, elect which portion she pleases.

2 Vern. 115. *Jesson v. Jesson*, 2 Vern. 255. *Thomas v. Kemish*, 2 Vern. 348. *Bruen v. Bruen*, 2 Vern. 439. *Herne v. Herne*, 2 Vern. 556. *Ward v. Lant*, Prec. in Ch. 182. *Walpole v. Lord Conway*, Barnard. 153. *Bellasis v. Uthwaite*, 1 Atk. 427. *Farnham v. Phillips*, 2 Atk. 215. *Spinks v. Robins*, 2 Atk. 491. *Shudal v. Jekyll*, 2 Atk. 516. *Wood v. Briant*, 2 Atk. 521. *Clarke v. Sewell*, 3 Atk. 98. *Johnson v. Smith*, 1 Vesf. 314. *Burrett v. Beckford*, 1 Vesf. 520. *Alleyn v. Alleyn*, 2 Vesf. 37. *Watson v. Earl of Lincoln*, Amb. 315. 1 Bro. Ch. Rep. 65. (n.) *Jeacock v. Falconer*, 1 Bro. Ch. Rep. 295. *Warren v. Warren*, and *Ackworth v. Ackworth*, 1 Bro. Ch. Rep. 305. 307. *Grave v. Earl of Salisbury*, 1 Bro. Ch. Rep. 425. *Holmes v. Holmes*, 1 Bro. Ch. Rep. 555. *Debeze v. Mann*, 2 Bro. Ch. Rep. 165. 519. *Powell v. Cleaves*, 2 Bro. Ch. Rep. 499. *Hanbury v. Hanbury*, 2 Bro. Ch. Rep. 352. 529. *Ellison v. Cookson*, 2 Bro. Ch. Rep. 307. 3 Bro. Ch. Rep. 61. *Baugh v. Reed*, 3 Bro. Ch. Rep. 192. As to cases of satisfaction or performance of an actual contract, *vide* *Blandy v. Widmore*, 1 P. Wms. 324.

6. Where a jointure is made after marriage, and the husband dies, leaving his wife an infant, if she, without doing any act to determine her election, marries a second husband, and he enters on the jointure estate, that entry will bind them both during the coverture.

7. A. by deed-poll assigns all his securities to a natural daughter, but afterwards treats them as his own, not having delivered the deed to her: he

M. 1708, cor. Cowper, C.

Carus v. Farmer,

2 Eg. Abr. 34. pl. 1.

Note; In this case the wife insisted on having both the legacy and one half of her fortune, because the securities were not altered.

T. 1711, cor. Harcourt, C. S.

Copley v. Copley,

1 P. Wms. 147.

2 Eg. Abr. 639. pl. 4.

See Mr. Cox's notes to this case from the Register Book.

(a) *Vide* *Blois v. Blois*, 2 Ch.

Rep. 162. *Jenkins v. Powell*,

28 Mar. 1748, cor. Hardw. C.

Harvey & Ux. v. Apsley & al.

3 Atk. 617.

M. 1749, cor. Hardw. C.

Johnson v. Smith, 1 Vesf. 314.

Vide *Thomas v. Kemish*,

2 Vern. 348.

Duffield v. Smith, 2 Vern. 258.
Upton v. Prince,
Ca. temp. Talb. 71.

It is said the rule of double portions holds only among children themselves, and not among collaterals or strangers, but there are no cases relating to double portions where that distinction is made, nor any reason for it, as it is a question of intent. In Thomas v. Kemish the rule was the same, though the estate might have gone over to collateral relations.

23 July 1764, cor. Northingt. C.
Arnold v. Kempstead & Ux.
Ambl. 466.

The case of Laurence v. Laurence, Freem. 234. and 2 Vern. 365, was relied on for the widow. Lord Northington admitted the principle in that case; but said, that here the testator's intention was manifest. *Vide* Villareal v. Lord Galway, Ambl. 682. Jones v. Collier, Ambl. 730. *Vide* also Noys v. Mordaunt, 2 Vern. 581. Prec. in Ch. 265. Gilb. Eq. Rep. 2.

19 June 1769, cor. Camden, C.
Villareal v. Ld. Galway,
Ambl. 682.

Vide Arnold v. Kempstead,
Ambl. 466.

Vide Jones v. Collier, Ambl. 730.

8 Mar. 1773. Dom. Prot.
Broughton, Bart. and another v.
Errington & al.
7 Bro. P. C. 12.

he afterwards executes and delivers to her a bond for 10,000*l.*, payable in three months after his decease, and devises to her all his real estate provided she married *B.*; and also devises all his personal estate to her, making her executrix. She refused to marry *B.*, and is therefore not entitled to the benefit of the deed and the bond, but has her election.

8. A testator by will devised a leasehold estate to his wife for life, and also a rent-charge during her widowhood, and devised all his freehold estate to *A.* in fee, subject to the rent-charge. The widow claimed both the rent-charge and dower. But decreed to make her election, either to take under the will or abide by her dower, it being manifestly the intention of the testator to give her the annuity in satisfaction of dower, and her claim of dower being in contradiction to the will.

9. A husband devises an annuity to his wife for life, and subject thereto gives *all his lands, &c.* to trustees upon other trusts. Bill by an infant *cestuy que trust* to have the trusts performed. The widow claimed the annuity and her dower also. *Per* Lord Chancellor.—The question is, if this annuity is to be taken in bar of dower? For two reasons it is: 1st, To allow the claim of dower would be to disappoint the will, it would put the widow in possession instead of the trustees, who are to hold the whole in trust for the widow as an annuitant. 2dly, The dower and annuity are inconsistent with each other. The rule laid down in *Noys v. Mordaunt*, which admits of no exception, takes place. There is a necessary implication in this case to bar the dower, for the testator has so disposed of his property as to leave no fund to answer a double claim, which, in effect, is saying the dower shall be barred.

10. *A.*, previous to his marriage, covenants to secure to his wife an annuity of 1000*l.* a-year, issuing out of lands, for her jointure, and in bar of dower. The marriage is had, and *A.* by his will devises to his wife certain parts of his real and personal estates of considerable value. Held, that she was entitled both to the estates devised, and to her annuity, and that the one was not intended as a satisfaction for the other.

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11. One gave an annuity to his wife for life charged on his real estate and subject thereto, and another annuity to another person, and devised all his estate real and personal over to A., &c. The widow's claim for dower exceeded her annuity by about 10*l. per ann.* Held, the widow was not entitled to the annuity and dower too, that not appearing to be the testator's *intention*. Decreed, therefore, that she should make her election.

9 July 1773, cor. M. R.
Jones v. Collier & al. Ambl. 730.
Vide Arnold v. Kempstead,
Ambl. 466.
Villareal v. Ld. Galway,
Ambl. 632.

12. The wife being entitled to an estate under the marriage settlement, the husband by will gave her an interest in another estate, and all his personalty in lieu of her claims. The will was not duly executed to pass real estate. She must elect between the personal estate and her claims under the settlement; but is entitled to delay her election until the account of the personal estate is taken.

H. 1783, cor. Thurlow, C.
Newman v. Newman,
3 Bro. Ch. Ca. 186.

13. Testator devised estates which he had surrendered in several parishes (describing them) to his wife for life, with remainders over. In one of the parishes he had a joint estate with his wife, and in others he had no estates but in her right; the estates of the wife not passing by the surrenders, do not by the will. The words of the will are too loose to raise a construction that the wife should elect.

T. 1785, cor. Thurlow, C.
Read v. Crop, 1 Bro. Ch. Ca. 492.

14. A widow having different interests under her marriage settlement and under her husband's will, and having proved the will, acted under it, and received the rents for six years, was held to have made her election to take under the will.

T. 1790, cor. Thurlow, C.
Buttrick, Widow, v. Bradburst,
3 Bro. Ch. Ca. 88.
Ld. Beaulieu v. Ld. Cardigan,
Ambl. 533. & 6 Bro. P. C. 232.
was cited; but Lord Chancellor said, "All that could be gathered
from that case was, that an election may be kept open for 50 years. No line could be drawn from
length of time; but it must be from circumstances shewing the intent of the party."

"from that case was, that an election may be kept open for 50 years. No line could be drawn from length of time; but it must be from circumstances shewing the intent of the party."

15. A testator enters into a marriage bond to leave 2000*l.* to his wife and children; but if no children, then to his wife. By will he gives her a life estate in his whole property. He died without leaving any issue. The wife shall not be put to her election, but shall take both.

P. 1791, cor. Thurlow, C.
Forstyn v. Grant,
3 Bro. Ch. Ca. 241.

16. A testator gives his wife an annuity charged on an estate of which she would be dowable. Mr. Justice Buller thought, that, upon the authorities, this was a case of election, but that the widow had not, by accepting payment of the annuity for three years, made her election to take that in lieu of dower, and therefore decreed for the plaintiff.

P. 1791, cor. Buller, J.
abf. Thurlow, C.
Wake v. Wake,
3 Bro. Ch. Ca. 255.
Sed vide Foster and Cook,
ib. 317. *et post.*
Mr. Just. Buller cited *Oswald v. Anderton* in Ch. 1788 or 1789.

3 Aug. 1791, cor. Thurlow, C.
Fester & al. v. Cook & al.
 3 Bro. Ch. Ca. 347.

17. *A.* being seised and possessed of real and personal estates, devised the same to trustees in trust to pay his wife 50*l.* per ann. so long as she continued his widow; and if she married again, then only 30*l.* per ann. He then made a provision for a child *en ventre sa mere*, and then devised his estate over, directing his trustees to possess themselves of all his estates and substance with convenient speed, and to improve the same for the benefit of his child, and to pay all his just debts. Testator then made a codicil, by which he gave his wife 20*l.* and another legacy; and if any overplus should remain of his personal estate in the trustees hands, he gave half of that to his wife. Testator soon after died. Bill by the trustees for an establishment of the will, and an account of the personal estate, and that the rights of the several claimants might be declared. The widow claimed her dower, and her annuity also. Objected, that the trustees are to have possession of the whole estate, which is inconsistent with the widow's dower; for that would put them out of possession (a). *Per Lord Chancellor.*—The direction to the trustees to possess themselves of all testator's estate and substance to pay debts is a most direct charge. As to the other point, the wife has a charge paramount the will. She has an absolute right to the third part, and it is not his to deprive her of it. But here it is to be gathered from circumstances that she is not to have it, and because he gives all his property to the trustees; I am to gather from his having given all he has, that he has given that which he had not. So far from a declaration plain, I have nothing even to lead me to think he meant to deprive the widow of her dower; she must therefore have her dower.

It is a rule that nothing but what is express shall deprive a woman of her dower.

18 Feb. 1793, cor. M. R.
Caruthers & al. v. Caruthers,
Widow, 4 Bro. Ch. Ca. 500.

It was contended in this case that an infant is bound at law by a jointure, and in equity will be bound by any covenant securing a jointure or any collateral satisfaction, whether freehold or not, that the law has given guardians an authority to bind infants by such a settlement, and this was said to have been determined in *Drury v. Earl of Bucks*, 5 Bro. P. C. 500. To the propositions

so largely laid down in that case his Honor made objection. It was said to have been determined, that by such a settlement during the minority of a female infant her own estate would be bound, and for this *Cannel v. Buckle*, 2 P. Wms. 242. and *Harvey v. Ashley*, 3 Atk. 607. were cited. But in those cases this was not the point decided, though something like the principle is established; and it appears

18. By articles made on the marriage of a female infant, a freehold and copyhold estate was settled on the husband's mother for life, remainder to the husband for life, remainder to the wife for life, with remainders over in bar of dower. This settlement will not bind the wife because of the uncertainty of its provision, and in regard the mother might (which she did) survive the husband. The wife may therefore elect to take her provision under the settlement, or her dower and free bench.

appears to have been the opinion of those judges, that such was the power of guardians, and that having the power of marrying their wards they must have that of making the collateral contracts. His Honor could not think that Lord Hardwicke laid it down so broadly. He thought it impossible to apply the principle more strongly to a *femals* than to a *male* infant, and as to males no such doctrine had been laid down. There has been no such decision, nor was the proposition insisted on in *Drury v. Earl of Bucks*. In *Durnford v. Lane*, 1 Bro. Ch. Ca. 106. the principle came in question, that was a new case; the husband there was an adult and the wife an infant. It was an attempt to bind the estate of the wife. Lord Thurlow had great doubts in that case. He held the husband bound by his own covenant, leaving the question open how far it bound the wife. In *Clough v. Clough* (Wooddeson's Systematic View, 3 vol. 453. (n.)), the question came directly before the court. It was to carry into effect a settlement made before the marriage of the widow *while she was an infant*. The decree declared that her estate was not bound by the marriage articles, and the bill was dismissed. That was an express decision of Lord Thurlow, that the contracts of male and female infants do not bind their estates. His Honor then went into a view of the case of *Drury v. Earl of Bucks*, which case it was said no judge ought to set his private opinion against. No question of *election* arose in that case. By the common law on marriage the wife acquires a right of dower in the freehold or a customary share in the copyhold estates of her husband or a provision from him under the statute. The case of *Drury v. Earl of Bucks* certainly did not mean to decide that guardians have a power to bind the right of the infant. In *Vernon's case*, 4 Rep. 2. Lord Coke has defined what is a jointure. His Honor thought that *Drury v. Earl of Bucks* decided, that where the provision is equally certain with the dower it is good. Any equitable provision which a woman takes must be as certain as her dower, and not that which she may never enjoy. If in the principal case the wife had been an adult, she might have bound herself by an equivalent provision, which she might have accepted with her eyes open; but an infant is not bound by a precarious interest, and a guardian is incautious where he attempts to bind an infant by such an uncertain provision, and in such case equity cannot call upon her to confirm it. *Vide Durnford v. Lane*. Wherefore decreed as above.

19. A widow cannot be put to election to take under the will of her husband, or her dower, unless by *express declaration*, or *necessary inference*, from the *inconsistency of her claim with the dispositions of the will*.

30 May 1795, cor. M. R. *French v. Davies*, 2 Ves. jun. 572.

20. A *feme covert* must elect between an annuity by will to her separate use for life, charged upon a devised estate, and a title paramount to part of the same estate in tail. Possession taken by her husband under that title does not preclude her election; but as it was manifestly the better interest, no inquiry was directed as to which would be most for her benefit.

31 July 1792, cor. Loughb. C. *Wilson v. Lord John Townshend*, 2 Ves. jun. 693.

claim under the whole. Therefore the law says, there shall be an election, and it gives an opportunity of electing which will not easily be held concluded.

Lord Chancellor said, No man can come into court claiming in repugnant rights. A tenant cannot set up a title against his landlord, nor can one who claims under a deed take under one claim and desire the court to shut their eyes against the rest; he must

21. In order to compel a widow to elect to take under a will, or her dower, her claim to dower must be contrary to or inconsistent with the dispositions under the will.

14 Nov. 1796, cor. M. R. *Sraham v. Sutton*, 3 Ves. jun. 249.

22. Where a devisee dies in the lifetime of the devisor, and the estate descends, the devisor's widow being entitled by the will to a provision, in bar of dower, must elect.

15 Mar. 1797, cor. M. R. *Pickering v. Lord Stamford*, 3 Ves. jun. 217.

23. A. tenant in tail with power to lease, remainder to B. wife of C. in tail, conceiving himself to have obtained the fee under a void execution of a power, made leases exceeding his power; reciting

24 May 1797, cor. Thurlow, C. *Earl of Darlington v. Pulteney*, *Lady Craven v. Pulteney*, 2 Ves. jun. 544; 2 Ves. jun. 384.

citing that he was seised of the freehold and inheritance, and covenanting for quiet enjoyment against any act or default of himself, or those claiming under him. *A.* devised the said estates and others to *B.* for life, remainder to trustees to preserve contingent remainders, remainder to her first and other sons in tail male, remainder to her daughter and her first and other sons, and to *D.* and his first and other sons successively in the same manner; and gave to *B.* and *C.* other benefits by his will; and gave the residue to *D.*, who filed a bill to have the will established. *B.* the wife elected to take her estate-tail, in opposition to the will, and which the Master reported to be for her benefit. After her death, *C.* who had taken under the will, claimed as tenant by the curtesy, and brought ejectments against the lessees, some of whom had expended considerable sums upon their tenements (*a*). Upon original bills preferred by *D.* and the lessees in 1795, Lord Chancellor was of opinion as to the form of *D.*'s bill, that there was great weight in the objection that the whole was completely and definitely arranged in a former cause, which commenced and existed in 1768 (*b*); and if there was any omission in that decree, it was not the subject of an original bill. As to the merits, that although the assets of *A.* would be liable to the lessees upon eviction, the benefit of putting a party to election does not extend to a residuary legatee; and that neither *D.* as a disappointed devisee, nor *a fortiori* the lessees could raise that equity against *C.*, holding as tenant by the curtesy under the election that *B.* had made to take her estate-tail against the will of *A.* The bill of *D.* therefore was dismissed, and that of the lessees retained, in order that, when they should have ascertained their damages, they might have satisfaction from the assets of *A.* (*c*); part of which had been received under his will by *C.*

(*a*) This cause was first heard cor. Lord Thurlow, in Mar. Ap. and May 1795, and is reported in 2 Ves. jun. 544. *ut supra*. When it was decreed that neither the lessees nor *D.* were entitled to stop the ejectments or to put *C.* to his election, but an injunction was granted on their undertaking to bring on their causes the following term.

(*b*) For a short account of this cause, see 2 Ves. jun. 552.

(*c*) Lord Chancellor said, it was impossible not to feel for the lessees in this case, for they contracted with *A.* and laid out their money upon the faith of his apparent situation, presuming, and not rashly, that he was the owner of the estate and could give them an indefeasible title, and his lordship said, if he could decide on the cause separately from any legal reasoning, he had a strong inclination to decree in favor of the lessees; but he could not by any stable rule support their case.

Sec. 11. Of Suits by and against the Husband and Wife, and by and against each other.

T. 1684, cor. North, C. S.
Gibson v. Sewington,
1 Vern. 247, 8.

1. **B**ILL against baron and feme, the wife only appears, and that without the husband's privacy; the bill cannot be taken *pro confesso* against the husband.

2. Though

2. Though the plaintiff abated her own suit by marriage, yet she had the costs of the whole suit, deducting only the charge of the bill of revivor.

P. 1685, cor. Guildford, C. S. Durbaine v. Knight, 1 Vern. 318. 1 Eq. Abr. 126. pl. 7.
This was thought hard, for that the abatement was by the party's own act, and for that, had defendants been in the right and so entitled to their costs, they could not have compelled plaintiff to revive.

3. A wife is not to be examined as a witness against her husband.

T. 1688, cor. Jeffries, C. Cole v. Gray & Ux. 2 Vern. 79. 1 Eq. Abr. 226. pl. 14. Vide 1 Inst. 6.

4. A decree is obtained against a man and his wife as administratrix of J. S. for 1500 l.; the wife dies, but being once charged, the plaintiff can proceed against the husband without reviving against the administrator of the wife, but the husband is not bound to answer farther than the estate he had with his wife.

M. 1690, cor. Lds. Comrs. Jackson v. Rawlins, 2 Vern. 195. 1 Eq. Abr. 3. pl. 10.

The book states the rule in equity to be, that where several are liable to a demand, all parties must be brought before the court.

5. Baron and feme bring a bill for a demand in right of the wife; the defendant answers. Witnesses are examined, and after publication passed, the husband dies. The wife may bring a new bill, and examine witnesses as if no examination had been in the former cause, for she is not bound by the proceedings in that cause.

M. 1690, Canc. Anon. 2 Vern. 197. Vide Shelberry v. Briggs 2 Vern. 249.

6. Sir R. B. was plaintiff against his lady & al. and a motion was made to have her committed for not answering interrogatories; but the court would not grant it, and declared that in this court a man could not be plaintiff against his wife; but the matter being moved again, the court thought that though a man could not have a bill against his wife for discovery of his own estate, yet where before marriage she enters into articles concerning her estate, she made herself a separate person, and was therefore ordered to answer in a week.

P. 1691, Canc. Sir Robert Brooks v. Lady Brooks, Prec. in Ch. 24. 2 Eq. Abr. 144. pl. 1.

7. Bill for a legacy against baron and feme, the feme being executrix of the testator. The defendants answer; witnesses are examined; and after publication past the husband dies. The suit is not abated, and the wife shall be bound by the answer and depositions; but it might be otherwise if the wife's inheritance was in question.

M. 1691, Canc. Shelberry v. Briggs & Ux. 2 Vern. 249. 1 Eq. Abr. 65. pl. 6.

Vide ante, Anon. 2 Vern. 197.

8. Bill against husband and wife for matters concerning the wife; they both answer, and then the husband died. The cause is abated, and plaintiff cannot proceed upon a bill of revivor, for the widow shall not be bound by her answer made *dum sub potestate viri*, but she may abide by it if she pleases,

H. 1697, Canc. Anon. 3 Salk. 84.

pleases, and then the plaintiff may proceed, and the decree shall bind her.

T. 1708, cor. Cowper, C.
Dubois v. Hole & Ux. 2 Vern. 613.

2 Eq. Abr. 65. pl. 7.

The regularity of the practice in this case is confirmed by M. R. in *Bell v. Hyde*, Prec. in Ch. 330. *et post*.

9. A bill is brought against baron and feme for a demand on the separate estate of the wife; the husband is beyond sea, and not amenable to the process of the court; yet if the wife is served with a *subpœna* she must appear, and answer the plaintiff's bill, for as to her separate estate she has a separate capacity.

P. 1709, cor. Cowper, C.
Anon. 2 Eq. Abr. 66. pl. 2.

A feme covert in her husband's absence allowed to answer without a guardian, on the circumstances of the case. Bunb. 167. 2 Vern. 613. The husband allowed to answer without the wife. Bunb. 175.

10. Where the husband will answer to the prejudice of the wife, who is an *executrix*, a court of equity, upon motion, will give leave for her to answer separately.

H. 1711, cor. Harcourt, C. S.
M. R. assist.

Bell v. Hyde & Ux.

Prec. in Ch. 328.

1 Eq. Abr. 65. pl. 8.

Gilb. Eq. Rep. 83.

3 P. Wms. 38. (n).

11. A wife having a separate estate, gave her own note of hand for 2000*l.*, her husband's debt, to prevent the seizure of his goods, he being very much involved, and in *Holland*. The wife afterwards refusing to perform her engagement, plaintiffs brought their bill to enforce payment. The bill was against husband and wife, but the wife only was served with a *subpœna*, and not appearing she was taken up on an attachment. On motion for discharging her, *Dubois v. Hole*, 2 Vern. 613. was cited as an authority for her detention by the plaintiff, but Lord Keeper doubted, and expressed his opinion that the process in that case was irregular, and that plaintiff ought to wait the husband's return. But his Honor was clearly of opinion, that the process in that case was regular, and that the husband was only joined in the suit for conformity; and said, that a woman did not by marriage lose her understanding and discretion, but rather improved it by her husband's teaching, and cited *Moor v. Hussy*, Hob. 95. where several cases are cited to the same purpose; and his Honor added, that the practice had been constantly so. Whereupon the wife prayed time to answer, which was granted, and she was discharged upon entering an appearance, and paying the costs of the motion.

Note; It was urged in this case that defendant not having appeared was not in court, and could not move by her counsel; but that was not regarded either by the court or bar.

P. 1716, cor. Cowper, C.

Sharston v. Hipsley,

2 Eq. Abr. 132. pl. 2.

4 Vin. Abr. 103.

V de Duches of Hamilton v. Inledon, 11 Vin. Abr. 279. pl. 53. 2 Eq. Abr. 456. pl. 7.

12. The plaintiff was solicitor, employed in a suit by the husband and wife, for recovery of a term of years in right of the wife; the husband died and left no assets, and the bill was to have a satisfaction out of this term so recovered, and now enjoyed by

by the wife. Lord Chancellor decreed the plaintiff a satisfaction of his demands out of the profits of this term, and he to be examined upon interrogatories as to what he hath received, and defendant to pay costs.

13. It was held in this case, that a wife cannot either by herself or her *prochein amy* bring a *homine replegiando* against her husband. The very nature of the writ and proceedings shew it cannot be he cannot imprison her; if he does, it will be a maintained (a). The husband by law has a right to the custody of his wife, and may confine her, but good cause for her to apply to the spiritual court for a divorce *propter servitium*.

P. 1718, Cané.
Atwood v. Atwood,
Prec. in Ch. 492.
Gilb. Eq. Rep. 149.

(a) *Vide* F. N. B. tit. *Homine replegiando*.

14. A feme covert's answer, without her husband or guardian, permitted to be filed in a case of necessity.

P. 1724, in Scacc.
Glover & al v. Young,
Bunb. 167.

15. A husband permitted to answer without his wife, upon an affidavit made that she declared she would not answer with her husband, for that she loved the plaintiff better, and would stand by him.

T. 1724, in Scacc.
Murriett v. Lyon & Ux.
Bunb. 175.

16. Regularly the answer of a feme covert, if separate, ought to have an order to warrant it; but if the feme covert's separate answer be put in without an order, and the same be a fair honest answer, and deliberately put in with the consent of the husband, and the plaintiff accepts of it and replies, the court will not on the motion of the wife or of her executors set it aside.

T. 1726, cor. King, C.
Duke of Chandos v. Talbot & Ux.
2 P. Wms. 371.
2 Eq. Abr. 145. pl. 5.
Sel. Ca. in Ch. 24. S. C. only
says, that a separate answer put
in by a feme covert without order
is irregular.

17. A feme covert cannot bind herself by her answer, much less her husband, as to her inheritance.

H. 1727, cor. King, C.
Evans v. Cogan, 2 P. Wms. 451.

18. A purchase is made to the use of baron and feme, and their heirs, and baron and feme join in a mortgage to the vendor to secure part of the purchase-money. The mortgagee files a bill of foreclosure; baron and feme answer jointly; the baron dies, and the wife moves to amend her answer, and insists that the mortgage did not bind her, for want of a fine; but the motion was denied, because an answer is equal to a fine, and the mortgage is good in equity, the wife not pretending she was imposed on.

M. 1729, cor. King, C.
Anon. Mos. 248.

H. 1731, cor. King, C.
Abergavenny v. Abergavenny,
 4 Vin. Abr. 147. pl. 20.
 W. Kel. 5.
 2 Eq. Abr. 145. pl. 6.
 2 P. Wms. 311. S. C. but
 not S. P.

19. On a motion to suppress the answer of the defendant, for that she marrying after the bill filed, and before answer put in, had put in her answer without her husband. *Per King, C.*—Marrying *pendente lite* does not abate the suit; and though there is no charge in the bill against the husband, or *subpœna* served on him, yet he must join in the answer of the feme for conformity; for no married woman can put in an answer without her husband, by the rules of the court, without special leave, and an order for that purpose.

H. 1733, cor. Talbot, C.
Wrottesley v. Bendish,
 3 P. Wms. 238.

20. Baron and feme are defendants to a bill. The feme must answer, though the answer cannot be read against the husband; but (may possibly) be read against her if she survives.

(a) *Vide* Sir Basil Firebrass's case, Salk. 550. & ante, tit. Answer, f. 1. pl. 1. and the cases cited in a special note thereto.

But in no case the feme is bound to answer the bill if tending to subject her to a forfeiture (a), though the husband has submitted to answer.

Anon. 1 Vern. 60. Bird v. Hardwicke, 1 Vern. 109. Chauncey v. Fenhoulet, 2 Vef. 265. Chauncey v. Tahourdin, 2 Atk. 392. In the principal case Lord Chancellor would have made no question of allowing the demurrer had defendants demurred; but defendants having submitted to answer, his lordship was at first at a loss how to determine, but afterwards held the answer sufficient (1).

(1) Generally a defendant must answer fully or object to the discovery by plea or demurrer. Cookson v. Ellison, 2 Bro. Ch. Ca. 252. Cartwright v. Harely, 3 Bro. Ch. Ca. 238. 1 Vef. jun. 292. Sheppard v. Roberts, 3 Bro. Ch. Ca. 239. Hall v. Noyes, 3 Bro. Ch. Ca. 483. Selby v. Seiby, 4 Bro. Ch. Ca. 11.

H. 1734, cor. Talbot, C.
Mallack v. Galton,
 3 P. Wms. 352.

21. An equity of redemption comes to a feme covert against whom and her husband a bill is brought to foreclose. The feme covert shall be foreclosed absolutely, and shall have no day to shew cause after the death of her husband.

To a bill by the widow to set aside the decree of foreclosure and be let in to redemption, the mortgagee pleaded the proceedings and decree in the former cause, by which it appeared that the present plaintiff, whilst covert, had joined her husband in a surrender of the copyhold estate in question which was settled upon her in jointure, and had been foreclosed. Plea allowed. Reg. Lib. B. 1734. fo. 189.

8 Feb. 1737, cor. Hardw. C.
Herring v. Toe, 1 Atk. 290.

22. A husband tenant for life, remainder to his wife for life, brings a bill alone for the opinion of the court upon the settlement. Objection for want of making the wife a party, allowed; for if the court should be of opinion against the husband, such decree would not bind the wife.

T. 1718, cor. Hardw. C.
Cotton v. Lutterell, 1 Atk. 451.

23. Though a wife is a defendant, and charged with fraud and malpractice, yet the evidence of the husband shall be admitted where the interest of a third person is concerned.

Where a charge of fraud is confined *solely* to the wife, there is no precedent of the court's making the husband pay costs.

24. Plain-

24. Plaintiff gave a *feme covert* a promissory note, and the husband dying before answer to a bill brought for discovery of the consideration, the suit was abated, for a *feme covert* can have no separate property.

P. 1739, cor. Hardw. C.
Leightbourn v. Holyday,
2 Eq. Abr. 1. pl. 5.

25. A wife, who cannot in conscience consent to such an answer as is drawn up by the husband, will be allowed to answer distinct from him.

24 July 1740, cor. Hardw. C.
Ex parte Halsam, 2 Atk. 50.

S. C. Where a husband by menaces prevails on a wife to put in an answer contrary to what she believes to be true, he may be punished for a contempt.

26. A criminal conviction against a husband may be read in evidence against him to subject him to penalties, but it cannot, in a civil suit, be read in evidence against the wife, where it would tend to make her incur a forfeiture of her portion for her life, especially if she is an infant, and no party to the conviction.

29 Oct. 1740, cor. Hardw. C.
Hanbury v. Lord Bateman,
2 Atk. 64.

Note: The conviction alluded to in this case was under 4 & 5 P. & M. c. 8. for the punishment of such as shall take away maiden inheritors under the age of sixteen, and marry them against the consent of their parents.

Plaintiff's sister had married a footman in defendant's family against the consent of her relations, not being sixteen years of age, whereby it was contended she forfeited her fortune. In the principal case the marriage not being proved, Lord Hardwicke reserved the consideration of it, and his lordship compared it to cases of disability under 11 & 12 W. & M. c. 4. against papists, in which the court will never suffer a conviction of recusancy to be given in evidence against a third person, but the facts must be proved.

27. If a bond be given to a *feme sole* who marries, the husband and wife must join in the action, and both must recover; but if a bond be made to the wife after marriage, the husband alone may bring the action and recover.

16 July 1741, cor. Hardw. C.
Bates v. Dandy, 2 Atk. 208.

28. Where there is a bond debt due to the wife *dum sola*, and the husband recovers it at law, there is no instance of this court's granting an injunction; for the suit was proper at law, and therefore this court leaves it to its natural course without meddling with a legal question.

27 Oct. 1742, cor. Hardw. C.
Jewson v. Moulson, 2 Atk. 420.
This was only a *disfium* of Lord Hardwicke, for the point was not before him, and he did not determine on it.

29. A husband bringing a bill against his wife is admitting her to be a *feme sole*, and she must put in her answer as such.

8 April 1747, cor. Hardw. C.
Ex parte Strangeways,
3 Atk. 478.

30. Appearance by wife without husband who lives abroad may be good.

8 Feb. 1750, cor. Hardw. C.
and Strange, M. R.
Travers v. Buckley, 1 Vesf. 386.

Vide Westdean v. —, Toth. 157. Dy. 210. *Lee v. Lord Baltimore*, Str. 475. *Carpenter v. Faulsten*, Salk. 114. is a very strong authority.

31. Where there is any thing for the separate use of a wife a bill ought to be brought by her *prochein amy*, otherwise it is her husband's bill.

24 July 1752, cor. Hardw. C.
Griffith v. Hood, 2 Vesf. 452.

D d 2

But

But there have been cases of a bill by husband and wife, and the court has taken care of the wife, and ordered payment to some person for her.

28 July 1755, cor. Hardw. C.
Pawlet v. Delaval, 2 Vef. 666.

32. A bill filed by the husband and wife, as in her right, is the bill of the husband.

25 Oct. 1755, cor. Hardw. C.
Garforth v. Bradley, 2 Vef. 676.

33. A husband may reduce the *chose en action* of the wife into his possession by suing for it in his own name, and recovering judgment during the coverture.

M. 1789, cor. Thurlow, C.
Sedwick v. Watkins,
3 Bro. Ch. Ca. 11. 1 Vef. jun. 49.
A writ of *ne exeat* was granted on such an affidavit in *Lake v. Deacon*, Toth. 158. and the like, was refused in *Holman v. Audley*, Toth. 160.

34. Motion for a *ne exeat regno* by a wife against her husband supported by her affidavit only. A wife's evidence against her husband *ex necessitate rei* may be allowed for security of the peace, but she cannot sustain an indictment against him. There is no case, either at law or in equity, where it is allowed in any other instance. It is a rule, that in no other case can the wife be evidence against her husband.

2 Mar. 1790, cor. Thurlow, C.
Coglar v. Coglar, 1 Vef. jun. 94.

35. Motion by a wife for a *ne exeat regno* against her husband till a suit instituted by her in the ecclesiastical court for alimony, charging him with cruelty and adultery, should be determined, unless he should give security to abide the event. Lord Chancellor desired to know for what sum he should mark the writ (a)? His lordship said, he knew it had been sometimes done at law upon affidavit to enable the judge to form an opinion, and by analogy to some cases (now a little exploded) a judge may increase damages. His lordship feared it could not be done under a notion of aiding the ecclesiastical court, but if he could find a precedent he would do it.

(a) Vide Anon. 2 Vef. 489.
Anon. 1 Bro. Ch. Ca. 376.

On the part of the wife were cited by her counsel Read v. Read, 1 Ch. Ca. 115. where a motion to supersede a writ of *ne exeat* was refused after a decree in the ecclesiastical court. Sir Jerome Smith's case, 2 Ventr. 145. where a *ne exeat* was granted on motion by the wife, who was suing for alimony in the ecclesiastical court. Lord Chancellor said, it had been done, but in Anon. 2 Atk. 210. the writ was refused, though Sir Jerome Smith's case was noticed, as also that of Read v. Read, in the former of which cases Lord Hardwicke said, it was granted out of compassion to the wife and to aid the ecclesiastical court.

5 Mar. 1791, cor. Thurlow, C.
Lillia v. Airey, 1 Vef. jun. 278.

36. The husband is a mere formal party to a bill against the wife, in respect of her separate estate or separate maintenance.

15 June 1793, in Scacc.
Chambers v. Bull, 1 Anstr. 269.

37. Motion on behalf of a husband (who sued jointly with his wife in the original bill for property claimed in her right, and was co-defendant with her in the cross bill) that he might answer separate from his wife, the cross bill being for an account of his receipts. An affidavit was produced

duced that his wife lived separate from him, and under the influence of the plaintiff. Ordered accordingly.

Vide 1 Eq. Abr. 65. pl. 5.
1 Ch. Ca. 296. cited.

38. A married woman is liable to creditors in respect of her separate property. If the husband and wife are separated by deed or sentence, the husband need not be a party to the action; but he must, if they are not so separated, though living apart.

T. 1793, cor. Loughb. C.
Duke of Bolton v. Williams,
2 Ves. jun. 145. 156.
In such case the action is
against husband and wife and the
judgment against the separate prop-
erty of the wife.

Equity will not make good against a married woman a contract on which she cannot be sued at law.

39. Plaintiff moved that a feme covert might put in her answer separate from her husband, on the ground that her husband was a prisoner in the King's Bench; and urged that the court will order it where the husband is abroad. But it was answered, the reason of doing it in that case was because he is out of the jurisdiction of the court. Lord Chancellor refused the motion, saying, it was quite new.

6 June 1794, cor. Loughb. C.
Anon. 2 Ves. jun. 332.

40. An action against an executor by a husband, for personal property bequeathed in trust for his wife, does not lie; because the husband would get it free from the condition which a court of equity would impose on him, of settling a proper portion of it on the wife.

24 July 1795, cor. M. R.
Wright v. Rutter,
2 Ves. jun. 676.

Sec. 12. Of the Wife's Paraphernalia and Pin-Money.

1. A Feme by her marriage articles agrees to have no part of her husband's personal estate but what he should give her by will. This bars her of her paraphernalia.

M. 1688, cor. Jeffries, C.
Cholmely v. Cholmely, 2 Vern. 82.
1 Eq. Abr. 66. pl. 5.

2. A term was created for raising 200*l.* per ann. pin-money to the wife, with covenants from the husband for payment of it. A year's arrear at the husband's death was held such a debt as should be charged on his trust estate settled for payment of his debts. (a) *Secur.* if it had been many years in arrear.

T. 1691, cor. Lds. Comrs.
Offley v. Offley,
Prec. in Ch. 26, 27.
1 Eq. Abr. 66. pl. 1.

Jewels and chamber-plate bought out of pin-money allowed to the wife as her paraphernalia,

(a) *Vide* Powell v. Hankey,
2 P. Wms. 82.

Thomas v. Bennett, 2 P.
Wms. 341. Fowler & Fowler,
3 P. Wms. 355. In Lord Towa-

Yend v. Windham, 2 Vef. 7. and being of small value in proportion to the husband's estate (b).
Peacock v. Monk, 2 Vef. 190.

The general rule of the court is said to be, that an account of pin-money shall not be carried back beyond a year, yet under particular circumstances it may be otherwise, as in the Countess of Warwick v. Edwards, 1 Eq. Abr. 140. pl. 7. *Ridout v. Lewis*, 1 Atk. 269.

(b) Cases in favor of a wife with regard to her *bona paraphernalia*. *Herbert v. Herbert*, Prec. in Ch. 44. *Tipping v. Tipping*, 1 P. Wms. 730. *Northey v. Northey*, 2 Atk. 78. *Seymore v. Tresilian*, 3 Atk. 358. *Snelson v. Corbett*, 3 Atk. 369. *Graham v. Lord Londonderry*, 3 Atk. 393. *Incedon v. Northcote*, 3 Atk. 438. *contra* *Ridout v. Earl of Plymouth*, 2 Atk. 104.

M. 1691, cor. Lds. Comrs.
Clergia v. Duke of Albemarle,
 2 Vern. 247.

Vide Lord Hastings v. Douglas
Bart. Cro. Car. 343. where it is
 said a husband may devise away
 his wife's paraphernalia, and that
 such devise shall stand good against her claim. *Sed vide contra*, *Tipping v. Tipping*, 1 P. Wms. 730.
Vide *Wilcox v. Gore*, 2 Eq. Abr. 626. pl. 2. *et post*.

3. A man devises his wife's jewels to her for life, and afterwards to his son. The wife makes no election or claim to have the jewels as her paraphernalia: her administrator shall not have them.

P. 1693, cor. Lds. Comrs.
Herbert v. Herbert,
 Prec. in Ch. 44.

(a) This is not a case decided, but a dictum only of Lord Commissioner Hutchins, (and appears to be the case of Sir Paul Neale v. Reeve, 1 Sid. 70.) for several questions concerning the wife's pin-money having come before the court, their lordships reserved their judgment till an account was taken.

To this point *vide* *Offley v. Offley*, Prec. in Ch. 27. *Gore v. Knight*, Prec. in Ch. 255. *Wilson v. Pack*, Prec. in Ch. 295. *Milles v. Wikes*, 1 Eq. Abr. 66. pl. 3. *Slanning v. Style*, 3 P. Wms. 337. 339. *Fowler v. Fowler*, 3 P. Wms. 353. *Cecil v. Juxon*, 1 Atk. 278.

4. A feme covert, who has pin-money or a separate maintenance settled on her, may, by writing in nature of a will, dispose of what she saves out of it, and such disposition shall bind the husband (a).

M. 1694, Canc.
Milles v. Wikes,
 1 Eq. Abr. 66. pl. 3.

5. A wife was allowed what she had saved out of her pin-money against the devise of her husband's real estate.

H. 1701, cor. Wright, C. S.
Cornwall v. Earl of Montague,
 1 Eq. Abr. 66. pl. 2.

6. Plaintiff's relation (to whom he was heir) allowed his wife pin-money, which being in arrear, he gave her this note: "I am indebted to my wife 100 l. which became due to her" such a day. After by will he makes a provision out of land for payment of his debts, and all monies which he owed to any person in trust for his wife. *Per C. S.*—This 100 l. is not within the trust; for a man cannot be indebted to his wife, and the money was not due to any person in trust for her. *Sed quere*, as the testator looked upon this to be a debt, and seemed to intend a provision for it by his will.

T. 1710, ebr. Cowper, C.
Willson v. Pack & al.
 Prec. in Ch. 295.
 2 Eq. Abr. 155. pl. 2.
Vide *Gillb. Ch.* 345. *Burton v. Pierpoint*, 2 P. Wms. 79. *Ld. Townfend v. Windham*, 2 Vef. 7.
Probert v. Morgan, 1 Atk. 440.

7. Plaintiff had sold woollen cloth (value 80 l.) to A., who died intestate, and defendant, by the consent of his widow, took administration. Plaintiff brought his action at law, and obtained judgment *de bonis intestati quando*, &c. A.'s widow had several jewels, which she pretended to have bought out

out of the savings of her pin-money settled on her before marriage. Bill against the widow to discover assets, and subject her jewels to a course of administration. The widow could not prove her pin-money was settled before marriage, nor that the jewels were bought out of her savings, and the man who sold the jewels knew nothing of the separate maintenance, but looked to the husband as his paymaster; wherefore decreed the jewels to be sold, unless the widow would pay the plaintiff his debt.

8. The question in this case was, if the husband can devise the *paraphernalia* of the wife to any other than the wife? Lord Chancellor *Harcourt* said, that this is a point of consequence, and he would reserve the consideration of it till after the *Master's* report upon the account.

may come against the wife to have her paraphernalia, but not a devisee under the husband's will; and there is not one case in the law to warrant such a devise. It is no argument to say that the husband may dispose of them in his lifetime, and that therefore he may give them away by will; for he may dispose of his wife's wearing apparel and her term in his lifetime, but he can dispose of neither by his will. It was held in *Lord Hastings v. Douglas*, Bart. Cro. Car. 343. that a husband may devise away his wife's paraphernalia, but Sir Joseph Jekyll said, *he* believed that cause was made up, for he did not recollect any judgment was given in that case (1).—Mr. Attorney-General North said, There was not an authority in the law that the husband cannot devise the paraphernalia of his wife; it is true the executor of the husband cannot take the wife's paraphernalia from her, and the case in Cro. goes no further.

It was the constant practice in great families to give the family jewels (2) to the wife for life, and then to the eldest son; and he said he never knew such a devise called in question, but always submitted to.—*Vide Tipping v. Tipping*, 1 P. Wms. 730. where Lord Macclesfield said, that bona paraphernalia are no more devisable by the husband from the wife than heir looms are from the heir; and decreed in favour of the wife.

(1) Sir Joseph Jekyll seems to have been mistaken in his conjecture; *Hastings* and *Douglas* was an action of trover by the administrator of the husband against the wife's second husband for the jewels which her first husband had bequeathed to her during widowhood, and judgment was given for the plaintiff; but Viscount *Bindon's* case, there cited, it seems, was not resolved; which is perhaps the case Sir Joseph alluded to.

(2) Surely it is not to be taken for granted that all family jewels are the wife's paraphernalia. In the Earl of Northumberland's case (*Owen*. 124.), notwithstanding all the husband's jewels were devised to his lady, yet his Garter and Collar of SS. was held to belong to the heir.

9. Where a baron borrowed of his sister jewels to present to his wife on his marriage, *Cowper*, C. said, this giving of them is a change of the property, and a kind of sale in market-overt, and on a devise of the real and personal estate for payment of debts, if the *personal* is not sufficient, and the *real* be, and the husband *devises to her all her jewels*, &c. she shall have the specific legacy of her jewels.

10. *J. S.*, having a *crotchet* of diamonds, which was his first wife's, in 1695 made his will, and (*int. al.*) devised this *crotchet* to his eldest son, and that it should go in succession to the heir of his family

Ridout v. Earl of Plymouth, 2 Atk. 104. *Snelson v. Corbett*, 3 Atk. 370. *Inledon v. Northcote*, 3 Atk. 438. *Parker widow v. Harvey*, 3 Bro. P.C. 187. *Sed vide contra Tipping v. Tipping*, 1 P. Wms. 729.

T. 1714, cor. *Harcourt*, C.

Wilcox & Ux. v. Gore & al.

11 Vin. Abr. 180. pl. 19.

2 Eq. Abr. 626. pl. 2.

Vide Clergis v. Duke of Albe-
marle, 2 Vern. 247.

In arguing the principal case,
Sir Joseph Jekyll said, creditors

may come against the wife to have her paraphernalia, but not a devisee under the husband's will; and there is not one case in the law to warrant such a devise. It is no argument to say that the husband may dispose of them in his lifetime, and that therefore he may give them away by will; for he may dispose of his wife's wearing apparel and her term in his lifetime, but he can dispose of neither by his will. It was held in *Lord Hastings v. Douglas*, Bart. Cro. Car. 343. that a husband may devise away his wife's paraphernalia, but Sir Joseph Jekyll said, *he* believed that cause was made up, for he did not recollect any judgment was given in that case (1).—Mr. Attorney-General North said, There was not an authority in the law that the husband cannot devise the paraphernalia of his wife; it is true the executor of the husband cannot take the wife's paraphernalia from her, and the case in Cro. goes no further.

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P. 1715, cor. *Cowper*, C.

Parker v. Harvey,

11 Vin. Abr. 181. pl. 20.

2 Eq. Abr. 627. pl. 3.

Lord Cowper's decretal orders
were in part reversed by the
Lords in May 1726. *Vide*
3 Bro. P. C. 187. *et post*, pl. 15.

M. 1719, cor. *Parker*, C.

Calmady v. Calmady,

11 Vin. Abr. 181. pl. 21.

2 Eq. Abr. 628. pl. 9.

family as an *heir loom*. In 1699, he married a second wife (the now defendant), and turned this *crotchet* into a *necklace*, and added several new diamonds to it, to the value of 200*l.* which was more than the value of the *crotchet*. The plaintiff as heir to J. S. (though not the eldest son to whom it was specifically devised) demanded this *crotchet* of J. S.'s widow. Lord Chancellor Parker seemed to doubt at first whether turning the *crotchet* into a *necklace*, and adding new diamonds to it, and permitting his wife to wear it, was not a revocation of the devise; but at last ordered the *Master* to examine and separate the old diamonds from the new, and decreed the diamonds of the *crotchet* to the plaintiff as heir at law, and *specifically* devised to him as an heir loom.

M. 1721, cor. Macclesfield, C.

Tipping v. Tipping,

1 P. Wms. 727, 730.

In *Probert v. Clifford*, Ambl. 6.

Lord Hardwicke thought this case went a great way, for by the old law the wife's paraphernalia were absolutely in the husband's power during his life.

II. A., by articles before marriage, covenanted with the wife's trustees to lay out 3500*l.* in land, to be settled on his wife for a jointure, remainder to the first, &c. sons of the marriage in tail male, and died intestate without issue, leaving real assets descending to his nephew and heir at law, but the personal estate was inadequate to pay the debts. The widow administered and brought her bill against the heir for her jointure, and that the deficiency of the personal might be made good out of the real estate, and the having jewels worth 200*l.* The question was, whether such jewels should be applied to satisfy the debts by covenant in case of the realty, *bona* paraphernalia being personalty, and the rule being that all personal estate should be applied to exonerate the real? Lord Chancellor thought that *bona* paraphernalia could no more be devised from the wife (a) than heir looms from an heir; so the right of a wife to her paraphernalia is to be preferred to that of a legatee. If a specific legacy be given by a husband, and he dies indebted by mortgage or bond, the heir shall not compel the specific legatee to part with his legacy in case of the real estate; but though the creditor may subject this legacy to his debt, the legatee shall stand in the creditor's place (b) in equity. If therefore a legatee shall have this favour in equity, much more shall a wife be privileged as to her paraphernalia. If the rule were otherwise, a specific legatee could compel the application of *bona* paraphernalia to pay any debt in case of his own legacy, whereas *bona* paraphernalia are liable only

(a) *Vide* 1 Roll. Abr. 911. the court divided as to this point.

(b) *Vide* *Clifton v. Burt*, 1 P. Wms. 678.

only (c) to debts, and in favour of creditors, not of an heir; but specialty creditors are out of this question, for they are sure to be paid out of the real estate in all events. Putting the creditors out of this case, his lordship decreed the wife shall retain her paraphernalia.

Lord Chancellor denied the rule, that in all cases the personal estate shall be applied to exonerate the real; for it shall not where the payment of any legacy (d) is thereby prevented, much less where it will deprive a widow of her paraphernalia (e).

12. *A*, on his marriage with *B*., settled his real estate on himself for life, remainder to his wife for life, remainder to the first, &c. son of the marriage in tail male, remainder to his own right heirs. *A*. had two sons of this marriage, and having a small freehold estate, devised his wife's jewels, and also the use of the plate, to her for life, and then devised his estate, subject to his debts and legacies, to *C*. *A*. died; the real and personal estates were not sufficient to pay his debts, whereupon the wife gave up her jewels and plate, and 25 guineas (being her dowry money), which were all applied to the payment of the debts; but in the decree for a sale of the real estate, the widow's claim was saved to her. The two sons then died under age, whereby the estate-tail of the settled lands expired, and the reversion in fee falling in, became liable by the will to the debts. Lord Chancellor now determined the following points:—1. The widow's dowry money could not be *bona* paraphernalia, for these are confined to the ornaments of her person; nor could it be her separate estate, being given (a) to herself, and not to her trustee; and a wife cannot have separate property (b) in a personal thing without a trustee, but dowry money is a gift to the church (c). 2. As to the jewels, the widow could have no title to them as paraphernalia; and this case differs from *Tipping v. Tipping* (d), regard being here had to the time of testator's death, when the real and personal assets were insufficient to pay the debts, and there was a deficiency even when the jewels, &c. were applied; and though afterwards, upon a remote contingency, (such as could not be presumed or waited for,) assets did fall in, it alters not the case as to the paraphernalia, for it might not have happened till

(c) As to the right of the wife to stand in the place of creditors who have been paid by means of her paraphernalia, vide *Tynt v. Tynt*, 2 P. Wms. 547.

(d) Vide *O'Neal v. Mead*, 1 P. Wms. 694.

(e) So decreed by Lord Macclesfield *casu* *Puckerin v. John-son*, same term.

T. 1722, cor. Macclesfield, C. Burton v. Pierpoint, 2 P. Wms. 79.
2 Eq. Abr. 627. pl. 7.

(a) Vide *Graham v. Londonderry*, 3 Atk. 393. and the cases there cited.

(b) See vide *Bennet v. Davis*, 2 P. Wms. 316.

(c) Vide *Gibson's Codex Juris*. Eccles. pt. 1. p. 519.

(d) 1 P. Wms. 729.

till after the widow's death, and therefore it was reasonable that, upon a deficiency at the testator's death, the jewels should be liable. 3. If the judgment creditors had taken these jewels in execution when the heir or executor had other assets, the widow ought not to suffer for this default; but here is no such default, in regard the creditors could not be kept in expectation of what might never happen. A subsequent contingency falling in must not exempt the jewels from debts to which they were liable upon testator's death, and a deficiency of assets at that time (a). 4. In the present case, there was an express bequest of the jewels, &c. to the widow, and as assets had now fallen in, though by a very remote accident, no creditor could be injured. *Held* therefore the widow's legacy should be paid, and the rather, as the real and personal estates were charged with the debts by the will; more especially it being the constant rule that a legatee, where the real estate is made liable to debts on the creditors exhausting the personal assets, shall stand (b) in the creditor's place, and be paid out of the land: and this rule applies stronger in the case of a specific legacy which was to be preferred to a pecuniary legacy.

(a) *Vide* Ridout v. Earl of Plymouth, 2 Atk. 104. Snelson v. Corbett, 3 Atk. 369. Graham v. Londonderry, 3 Atk. 393. *Ld.* Townsend v. Windham, 2 Ves. 7. and particularly Tynt v. Tynt, 2 P. Wms. 542.

(b) *Vide* Clifton v. Burt, 1 P. Wms. 678. Hastedwood v. Pope, 3 P. Wms. 323.

M. 1722, cor. Macclesfield, C. Powell v. Hanky, 2 P. Wms. 82. 2 Eq. Abr. 151. pl. 11.

13. The wife before marriage, with the consent of her intended husband, conveyed her real estate to trustees to such uses as she should notwithstanding her coverture appoint, and assigned all her mortgages and bonds to her separate use. After marriage the wife constantly permitted her husband to receive the interest of all these securities and bonds. Also the wife consented to sell 10*l.* per ann. part of her inheritance, for 200*l.*, which the husband received, and therewith founded a charity for widows, giving a bond to the trustees for the 200*l.*, payable three months after his wife's death. Decreed, that as to the principal money due on the mortgages and securities, the husband's executors must make that good out of his assets, with interest from his death; but as to the interest received by the husband during the coverture with the wife's consent, it must be construed as a gift, the wife having participated in the enjoyment of more plentiful living during the coverture. If the husband was to be considered as a creditor for all his receipts of the interest money, it might ruin his estate and prejudice his children. As to the case

case of separate maintenance, the husband supporting his wife, barred her claim in this respect (a); for if she was not contented that her husband should receive her money and maintain her, she might complain to her trustees. As to the wife's accepting her husband's bond for 200*l.*, payable after her death, for the use of her executors, this waived the interest during her life, and she does not attempt to avoid the bond by a charge of fraud in gaining her acceptance of it. This being her separate estate she must here be considered a feme sole (b); besides, it was reasonable to suppose she should contribute to the charity founded by her husband for the benefit of widows in so small a degree, so that there is the more cause to decree she should be bound by this bond.

(b) *Vide* Allen v. Papworth, 1 Vesf. 163. Grigby v. Cox, 1 Vesf. 517. Hulme v. Tennant, 1 Bro. Ch. Ca. Rep. 16. Pybus v. Smith, 3 Bro. Ch. Rep. 340.

(a) *Vide* Thomas v. Bennett, 2 P. Wms. 341. where it was determined that arrears of pin-money were not recoverable, the husband and wife having cohabited together and the wife being maintained by her husband; and in Fowler v. Fowler, 3 P. Wms. 355. it was held, that the husband providing clothes and other necessaries for his wife is a bar to her claim of pin-money during that time.

In Lord Townsend v. Windham, 2 Vesf. 7. and Peacock and Monk, 2 Vesf. 190. the general rule is said to be, that an account of pin-money shall not be carried beyond the year, yet otherwise in the Countess of Warwick v. Edwards, 1 Eq. Abr. 140. pl. 7. Ridout v. Lewis, 1 Atk. 269.

14. An annual sum was secured for a wife's pin-money for her apparel and expences. If the husband and wife cohabited together, and the husband maintain her, the arrears of pin-money are not recoverable.

proved that the wife never demanded her pin-money in the husband's lifetime or in her own, but after his and her death her executors made a demand of 500*l.* for ten years' arrear. *Non allocatur.*

H. 1725, cor. King, C.
Thomas v. Bennett,
2 P. Wms. 341.
2 Eq. Abr. 155. pl. 3:
Vide Powell v. Hankey,
2 P. Wms. 84.

Note; In this case it was

15. Where a man's real and personal estate are charged by his will with the payment of his debts, and afterwards turn out insufficient, his wife's jewels and *paraphernalia* shall be sold towards making good the deficiency.

term 1715, (*vide ante*, pl. 9.) and afterwards before Lord Macclesfield in Hil. 1723, and now the decree and decretal orders before made were partly reversed by the Lords.

2 May 1726, Dom. Proc.
Parker, Widow, v. Harvey & al.
3 Bro. P. C. 187.
2 Eq. Abr. 627. pl. 3.
11 Vin. 181. pl. 20.

This cause was originally heard before Lord Cowper in Easter

16. *A.* is principal in a recognizance of 5000*l.*, and *B.* and *C.* are sureties. *A.* jointures his wife before marriage in lands without notice of this recognizance, and devises his real and personal estates to *B.*, and dies. The personal estate of *A.* shall be first applied towards this recognizance, then his land devised, (the devisee being a volunteer,) next the *paraphernalia* of the wife of *A.*; and lastly, the two sureties shall contribute to make up the deficiency. It was contended on behalf of the wife, that she might pay off the cognize of this recognizance, and take an assignment of it; and then she may extend it at law, and the surety shall have no remedy against her in equity, she being a purchaser without notice. *Sed*

T. 1729, cor. M. R.
Tynt v. Tynt, 2 P. Wms. 544.

(a) As against real assets *de-
franded*, it seems upon the autho-
rity of *Tipping v. Tipping*,
1 P. Wms. 730. the wife shall
stand in the place of creditors for
the amount of her paraphernalia.
So *Snellson v. Corbett*, 3 Atk. 369.
Graham v. Londonderry, 3 Atk.
303. *See* *quare*, as against real
assets *devised*; *et vide* *Probert v.*
Clifford, Amb. 6. *Vide* *etiam* *In-*
gleton v. Northcote, 3 Atk. 458.
contra.

M. 1734, cor. Talbot, C.
Slanning v. Syke,
3 P. Wms. 337. 9.
3 Eq. Abr. 156. pl. 4.

Vide *Calmady v. Calmady*.

P. 1735, cor. Talbot, C.
Fowler v. Fowler,
3 P. Wms. 353. 5.
2 Eq. Abr. 156. pl. 5. 355. pl. 22.
Vide *Cuthbert v. Peacock*,
Salk. 155. *Duchess of Beau-*
fort v. Lady Granville, 1 P.
Wms. 114. *Ball v. Smith*,
2 Vern. 675. *Chauncey's case*,
1 P. Wms. 409. *Thomas and*
Benett, 2 P. Wms. 343.

Vide *Powell v. Hankey*, 2 P.
Wms. 84.

16 July 1737, cor. Hardw. C.
Seymour v. Tresilian, 3 Atk. 358.

per cur — The court will hardly direct such an assignment to load a surety. If the jointress could get such an assignment, the sureties may have an *audita querela*, insisting that the principal cognizor's lands, either in his own hands, or in the hands of alienees, ought to be liable before any of the sureties lands be extended; and as to the paraphernalia of the widow, though there be debts more than the personal assets will extend to pay, yet, as these are liable only in favour of creditors, and not of the heir or devisee (a) who stands in the place of the heir, and is *hæres factus*, if the lands devised be sufficient to pay the recognizance, the paraphernalia shall be enjoyed by the widow; but if those devised lands should prove insufficient, the paraphernalia must be liable before the sureties lands shall be extended,

17. An husband voluntarily and after marriage allows the wife, for her separate use, to make profits of all butter, eggs, pigs, poultry, and fruits, beyond what is consumed in the family, (calling it her pin-money,) out of which the wife saves 100*l.*, which the husband borrows, and dies. The court allowed of this agreement to encourage the wife's frugality, and the wife admitted to come in as a creditor for this 100*l.*, especially there being no defect of assets to pay debts.

So where the husband agreed that the wife should take two guineas of every tenant that renewed a lease with the husband beyond the fine which the husband received. This was allowed to be the wife's separate money.

18. A husband on marriage settles 100*l.* *per ann.* pin-money in trust for the wife for her separate use, which becomes in arrear, and then the husband gives the wife a legacy of 500*l.*; after which there is a further arrear of pin-money, and then the husband dies, this legacy being greater than the debt, decreed, even in the case of a wife, to be a satisfaction of the arrears of pin-money due before the making of the will.

Where pin-money is secured to the wife, and the husband finds her in clothes and necessaries, this is a bar as to any arrears of pin-money incurred during such time.

19. Bill by a wife for her paraphernalia. The husband by his will gave his wife 10,000*l.* on condition

condition she gave up her dower, and also gave her "all her wearing apparel, and ornaments of her person, her gold watch, and all her jewels, except some round a picture, and devised the residue of his estate to the defendant." Testator by codicil revoked the devise of *his* jewels, and her pearl necklace, which he gave to *A.*; and by a second codicil he gave her a pair of diamond earrings. Defendant insisted the wife should not claim these paraphernalia, being contrary to the will and codicil by which she claims the 10,000*l.*, and equity will not permit one to claim under one part of the will and controvert another; that by the devise of the residue, the revocation of the devise of the jewels, and the gift of the ear-rings only, it appeared to be testator's intention that the rest of the paraphernalia, except the ear-rings, should go to the defendant as the residue of testator's estate. *Per cur.*—It is plain the paraphernalia are included in the devises in the will, though a husband cannot devise away a wife's paraphernalia; he can only bar her by acts in his lifetime. The revocation of the devise of *his* jewels, which seem to be contradistinguished from *hers* in the will, and which are there called the ornaments of *her* person, and the diamond ear-rings do not appear to have been ever worn by her, and therefore might not be part of her paraphernalia; but if the testator had revoked the devise, he only revoked a devise void in itself; and therefore it is too much strained to infer from thence an intention that her rights should pass by the devise of the residue. Decreed for the plaintiff.

20. *A.* had 300*l.* per ann. pin-money. The husband, for several years before his death, paid her 200*l.* only, but promised her she should have the whole at last. If a wife accepts less, or lets her husband receive what she has a right to receive to her separate use, it implies a consent in her to submit to such a method. But where the pin-money is paid to her *eo nomine*, her agreement with the husband relating to her separate estate amounts not to a new agreement, and his promise she should have it at last is an undertaking to pay the arrears. Decreed for the wife.

21. *Mary Lucas*, in her last illness, requested of her husband that her wearing apparel, gold watch, pearl necklace, rings, &c. in her possession and used by her, might be given to her daughter, and put into a friend's hands for her daughter's use,

Vide Tipping v. Tipping,
1 P. Wms. 730.

25 Mar. 1738, cor. Hardw. C.
Ridout v. Lewin, 1 Atk. 269.
Vide Ridout v. Earl of Plymouth, 2 Atk. 104, which seems to be connected with this case, though not S. P.

12 July 1738, cor. Hardw. C.
Lucas v. Lucas, Widow,
1 Atk. 270, 271.

use, which the husband promised; and after the wife's death gave the said things to his daughter, and made an inventory, and locked them in a strong chest, and gave the key to his wife's friend, and sent the things therein to her for his daughter's use. Though the husband afterwards took some of the things into his possession again, that is not sufficient to invalidate the gift, which was perfect by the former act.

It was so determined in the case of Mrs. Hungerford, and in Lady Cowper's case, before Sir Joseph Jekyll, where gifts from Lord Cowper in his lifetime were

supported and reckoned in equity as part of the personal estate of Lady Cowper.

21 May 1739, cor. Hardw. C.
Probert v. Morgan and another,
1 Atk. 441.
Vide Probert v. Clifford,
Ambl. 6. and *post*, pl. 23.
which seems to be S. C. though
differently stated; that, however,
is stated from the Register's Book.

22. A widow brings her bill to have the deficiency of her jointure made good out of the assets of her husband and his father, and also for 1000*l.* left her by her husband, payable with interest from three months after his death, and for her paraphernalia. The father and son having covenanted that the land settled upon her for her jointure were worth 300*l.* per ann., and being both parties to the marriage contract, it was held she had a lien upon the estate of the father and son; and an account of assets was decreed, and that the deficiency should be made good out of the son's estate, it appearing that he had received most of the fortune.

S. C. The 1000*l.* given by the will to the wife, said Lord Chancellor, cannot be considered as a satisfaction for the deficiency of her jointure; for as the jointure lands are covenanted to be worth so much clear of all reprises, the testator intended the 1000*l.* as a bounty.

S. C. If a person in the execution of a power sufficiently describes the estate he had a power to charge, the estate is bound, though there is no reference to the deed out of which the power arises.

With regard to the paraphernalia, it was strongly insisted on by defendant that the wife cannot stand in the place of bond creditors; and *Tipping v. Tipping*, 1 P. Wms. 729. was cited for that purpose. *Sed per cur.*—The wife may have her paraphernalia where there are real estates descended, *aliter* in the principal case. The case of *Clergis v. Dukes of Albemarle*, 2 Vern. 246. had been carried far enough; for though it is there laid down that where *A.* dies intestate, or by will doth not dispose of the jewels, his wife may claim, in case there be no debts, the jewels suitable to her quality to be worn as the ornaments of her person; yet by the old law they were absolutely in the power of the husband, and if he by will devised away the jewels, such devise should stand good against the wife's claim of paraphernalia. *Vide Lord Hastings v. Douglas*, Bart. Cro. Car. 343. 1 Roll. Abr. 911. f. 9.

S. C. Where there are real estates descended, the wife may be entitled to her paraphernalia; but otherwise in this case, where the real estates came by the husband.

23. The wife's paraphernalia, together with the whole of the personal estate, having been exhausted in payment of the husband's debts, the question was, Whether the wife should be permitted to stand in the place of the specialty creditors, so as to receive a satisfaction for her paraphernalia out of the real estate which her husband had *devised* (for it did not appear that any part of the real estate had been left to *descend*)? Lord *Hardwicke* said, that the court had decreed satisfaction for paraphernalia out of the real assets *descended*, as in *Tipping and Tipping*, 1 *P.Wms.* 730. (a); but that case had gone a great way; for by the old law the wife's paraphernalia were absolutely in the power of the husband during his life, and that as the court had not in any former instance decreed the wife satisfaction for her paraphernalia out of real assets against a *devisee*, he would not establish a precedent; and by the decree his lordship declared that if the personal estate of the testator was not sufficient for payment of the debts, such deficiency was to be raised by sale of the testator's real estate liable to specialty debts; and it was ordered that the Master should inquire whether any real assets of the testator *descended* to his heir, and if any such, then that the same or a sufficient part thereof should be sold in the first place for payment of the debts, and if that should not be sufficient, then that the *devised estates* or a sufficient part thereof should be sold for the same purpose, and such devised estates were to contribute in proportion. And as to the claim of the wife in respect of her paraphernalia, his lordship declared she was entitled to a satisfaction for the same out of such part of the testator's real estates *descended upon his heir at law* as should remain after payment of the debts.

18 May 1739, cor. *Hardw. C.*
Probert v. Clifford, *Ambl.* 6.
1 *Eq. Abr.* 66.
Reg. Lib. B. 1738, fo. 310.
2 *P.Wms.* 544. n.

This case appears to have been determined in *P.* 1736, and not in 1739 according to *Ambl.*
Vide Probert v. Morgan and Clifford, 1 *Atk.* 441., and *ante*, pl. 22., which seems to be *S. C.* though differently stated.

(a) *Vide also Snelson v. Corbett*, 3 *Atk.* 369. *Graham v. Londonderry*, 3 *Atk.* 393.

Vide Townsend v. Ash, 2 *Ves.* 7.
Northey v. Northey,
2 *Atk.* 77.

Vide Inledon v. Northcote,
3 *Atk.* 438. *contra.*

24. Bill by a widow against her husband's executor for her paraphernalia; part of them were given by her husband, part by her own relations, and other part she purchased with her own money. The husband took the jewels into his own possession, and disposed of some of them by will to different persons; the rest he directed his executor to sell, but afterwards by codicil he gave them to the executor absolutely. *Per cur.*—The executor not having assented to the legacies, the widow might have brought trover for these specific things, for the legacies did not vest till assented to, and then

10 Nov. 1740, cor. *Hardw. C.*
Northey v. Northey, 2 *Atk.* 77.
9 *Mod.* 270.

then the legatees must come against the executor in equity, where he will be decreed to deliver up the specific bequests according to the will, he being in equity a bare trustee. In this case the specific legatees were infants, and not before the court, which they ought to have been; and unless the widow will waive what is bequeathed to them, they must be made parties.

6 Dec. 1740, S. C. reheard.

The widow now waived the legacies given to the infants, but claimed what was given to the executor. *Per cur.*—The late cases have gone so far as to consider a wife in nature of a creditor, having a lien upon real estate for her paraphernalia. The jewels in this case were worth 3000*l.*, but that made no difference in equity. There have been many cases where debts have been outstanding against the husband, and yet the wife has been admitted a creditor to the value of her paraphernalia, even upon trusts created for payment of debts. The jewels being in the possession of the husband made no alteration, for the possession of the husband is the possession of the wife, (and so *vice versa*;) as she wore them when she was dressed. The testator having disposed of the paraphernalia, which he had no power to do, decreed for the wife, according to the prayer of her bill, and the husband's estate to pay costs.

16 Dec. 1740, cor. Hardw. C.
Ridout v. Earl Plymouth and others, 2 *Atk.* 104.

Vide *Ridout v. Lewis*, 1 *Atk.* 269. which seems to be connected with this case, but is not S. P.

In this case a distinction was made between the jewels of the wife before marriage and those given to her during coverture.

The wife's counsel contended, that in the former case the husband should be considered only as a trustee, and in the latter the jewels were too trifling to be taken as a part of the husband's personal estate. Lord Chancellor admitted the hardship of the wife's case, but said, that though the wife before marriage had an absolute property in the jewels by virtue of the gift, yet immediately on the marriage the law vested them in the husband; and where his personal estate is not sufficient to pay his debts, the wife cannot set up any claim to them, neither is there a pretence that the jewels given after marriage shall be considered the property of the widow; but as none of the parties opposed it, his lordship gave the widow liberty to purchase her jewels at the price set upon them by the Master.

7 Nov. 1741, cor. Hardw. C.
Marshall v. Blew, 2 *Atk.* 217.

26. A wife is not barred of her paraphernalia by a devise of the use of all household goods, furniture, plate, linen, &c. for life.

5 Aug. 1743, cor. Hardw. C.
Read v. Snell, 2 *Atk.* 642.
It was determined in *Rawlinson v. Rawlinson*, 8 July 1714,

27. A wife who by articles before marriage is by express words barred of every thing she could claim out of her husband's personal estate by the

common

common law, custom of London, or otherwise howsoever, has no right to paraphernalia.

and has been so held ever since, that where the wife has compounded with the husband, he is to be considered in regard to the custom as leaving no wife; and it follows therefore that she can have no claim by the custom to her paraphernalia, and this is a stronger case than *Chomley v. Chomley*, 2 Vern. 47.

28. Where personal estate has been exhausted by a husband's creditors, and there is a trust estate charged with the payment of debts, the wife is entitled to come upon that estate to be reimbursed the value of her paraphernalia.

2 Mar. 1746, cor. Hardw. C. *Inledon v. Northcote*, 3 Atk. 438e

29. Where the personal estate has been exhausted in payment of specialty creditors, the widow shall stand in their place to the amount of her paraphernalia, upon the real assets of the heir at law.

16 July 1746, cor. Hardw. C. *Snelson v. Corbett and another*, 3 Atk. 369.

S. C. Paraphernalia shall be applied towards satisfaction of simple contract debts, but it is not liable to satisfy testator's legacies.

equity determines not so strictly, for she has a prior and a superior right to legatees who take only from the bounty of the testator.

In this case Lord Chancellor said, that though at law, if a husband dies indebted the widow shall not have her paraphernalia,

30. Diamonds given to the wife by the husband's father on her marriage with his son, are considered as a gift to the separate use of the wife, and she is entitled to them in her own right.

24 Nov. 1746, cor. Hardw. C. *Graham v. Londonderry*, 3 Atk. 393.

A present by a stranger to the wife, during coverture, must be considered as a gift to her separate use, though not so clear a case as the other.

Trinkets given by a husband to his wife, determined to be her separate estate.

Vide Lady Cowper's case, Lucas v. Lucas, 1 Atk. 270. *Brinkman v. Brinkman*, 19 November 1740.

Where a husband gives things expressly to a wife, to be worn as ornaments of her person only, they are to be considered merely as paraphernalia; for if they were to be considered as a gift, she might dispose of them absolutely contrary to his intention.

A husband may alien the jewels a wife wears for the ornaments of her person.

If a husband pledges the wife's paraphernalia, and leaves a sufficient estate to redeem the pledge, she is entitled to have it redeemed out of his personal estate.

The right of a wife to paraphernalia is to be preferred to that of a legatee, which is a stronger case, and has been followed by the court ever since.

Vide Tipping v. Tipping, 1 P. Wms. 730.

As the diamond necklace in this case has been sold, *Lady Londonderry* is entitled to an account according to the value at which it has been sold.

13 July 1750, cor. Hardw. C.
Lord Townsend v. Windham,
 2 Ves. 7.

31. No paraphernalia is allowed where the husband dies indebted, though the court will let the wife in on other funds, if there are any; but she can only be admitted a creditor by simple contract for one year's arrear of pin-money against her husband's estate.

14 June 1784, cor. Thurlow, C.
Boynton v. Parkhurst,
 1 Bro. Cb. Ca. 576.
 1 Eq. Abr. 66.
Vide Tipping v. Tipping, 1 P.
 Wms. 729. on the authority of
 which this case was decided.

32. Jewels of the wife, given by the husband's will to her for life, shall not be sold for payment of the husband's debts, charged on a real estate, in aid of personalty. Decreed the jewels to the wife, in prejudice of the charged estate.

Sec. 13. Of the Separation of Husband and Wife: And herein of the Alimony and separate Maintenance of the Wife, and of her Debts contracted after Separation.

H. 1682, cor. North, C. S.
Lord Paget v. Read, 1 Vern. 143.
 1 Eq. Abr. 61. pl. 2.

1. A Feme covert parted from her husband wastes goods, the bare use whereof was devised to her for life, remainder over to plaintiff, who was a stranger. The husband shall be charged for this conversion of his wife, plaintiff's title being paramount, and not under the wife.

M. 1682, Canc.
Ferrars v. Ferrars, 1 Vern. 71.
 1 Eq. Abr. 61. pl. 3.

2. A feme covert who lived apart from her husband, and had a separate maintenance, bought goods of several tradesmen, who knew of her separation. Upon the husband's death they brought actions at law against his executors, and obtained verdicts. The executors then filed their bill for an injunction, which was denied, they having had (by their own allegations) a very good defence at law.

Vide Scott v. Manley,
 1 Sid. 109. cited.

M. 1682, cor. North, C. S.
Hincks v. Nelborpe, 1 Vern. 204.
 1 Eq. Abr. 40. pl. 5. 77. pl. 11.

3. Upon a bill by the wife to discover the acts of hard usage towards her from the husband, and to establish an agreement for a separate maintenance, the husband demurred, for that the matter was not examinable or relievable in equity. Demurrer allowed.

P. 1685, cor. Guildford, C. S.
Kenge v. Delawall, 1 Vern. 326.
 1 Eq. Abr. 63. pl. 3.

4. A woman living apart from her husband, and having a separate maintenance, contracts debts. The creditors by a bill in equity may follow the separate maintenance whilst it continues, but when that is determined by her husband's death, they cannot

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not by a bill charge her jointure with those debts, and the rather, for that the executor of the husband who may have paid the debt is not made a party. Bill dismissed. *Vide Compton v. Collinson, 2 Bro. Ch. Ca. 384, 385.*

5. Upon a treaty for the separation of husband and wife, it was agreed, that the husband should return his wife's portion to her father, who should maintain his daughter and her child, and indemnify the husband against his wife's maintenance and debts. Upon a bill by the father, this agreement was established by a decree in equity, though the husband offered to take back and maintain his wife and child.

M. 1700, cor. M. R. Seeley v. Crawley, 2 Vern. 386. 1 Eq. Abr. 67. pl. 5.

6. By marriage articles the wife's portion was agreed to be laid out in land, to be settled to certain uses therein named, but before the trusts of the settlement could be executed, the wife by the hard usage of the husband was forced to leave him, and live separate from him. Bill by the wife to have the trusts of the settlement performed, and cross bill by the husband to have the money invested in a purchase. Decreed (on proof of the wife's ill treatment) that her portion should be placed out at interest, and that she should receive the same for her maintenance until there should be a cohabitation; for as the court will compel a husband who goes into equity for his wife's fortune to make a settlement on the wife, if she survives, so much the rather ought the court to do it where the wife is reduced to a starving condition; and especially, as in this case (a), the execution of a trust is to be directed by the court.

P. 1705, cor. Cowper, C. S. and M. R. assist. Oxenden v. Oxenden, 2 Vern. 493. 1 Eq. Abr. 67. pl. 6. and Prec. in Ch. 239. S. C. nomine Rockingham and another v. Oxenden. Vide Mildmay v. Mildmay, 1 Vern. 53. Watkyns v. Watkyns, 2 Atk. 366. Angier v. Angier, Prec. in Ch. 499. (a) It was objected in this case that alimony was only suable in the spiritual court, and that to decree it in this case would be to decree a divorce.

The court however would not decide on this objection in regard that a trust remained to be performed.

As to the rule, that a husband shall not take a wife's portion till he has made a reasonable provision for her. See a special note to *Jewson v. Moulson, ante, f. 9.*

7. A wife being separated from her husband, and having a separate allowance, may make a gift of her savings, as if she was a feme sole; and the person to whom such gift is made shall not be considered as a trustee for the husband.

14 Dec. 1705, Dom. Proc. Gage v. Lister, Widow, 1 Bro. P. C. 112. 4 Vin. 178. c. 17. 443. c. 9.

8. A woman having been used with cruelty by her husband, becomes entitled to 3000*l.* as her share of her mother's personal estate, who dies intestate. Decreed, the money to be put out, and the interest paid to the wife for her separate use, and then to the husband for life, if he survived her, and the principal to be paid to the issue; and if no issue, to the survivor of husband and wife.

P. 1711, cor. Harcourt, C. S. Nichols v. Danvers & al. 2 Vern. 671. 1 Eq. Abr. 68. pl. 7. Vide Williams v. Callow, 2 Vern. 752. Oxenden v. Oxenden, 2 Vern. 493. Mem. The husband in this case gave his wife a note, that if he should again use her ill she should have her share of her mother's estate to her own use.

T. 1715, cor. Cowper, C.
Dutton v. Dutton & al.
 4 Vin. Abr. 178, pl. 18.
 2 Eq. Abr. 150, pl. 7.

9. *D.*, having more than 3000 *l. per annum*, married *M.*, who had 10,000 *l.* portion, and settled 1000 *l. per annum* upon her for her jointure; and the greatest part of *D.*'s estate was settled upon the first and every other son in tail male successively. *D.* run greatly in debt, and *J.* his eldest son being of full age, *D.* upon a calculation of his debts, and the value of his estate for life, with impeachment of waste, agreed with *J.* to convey all his estate to him, and *J.* covenants to pay all *D.*'s debts, and to allow him 500 *l. per annum* rent-charge for his life; and further (upon which the question arises) that *J.* shall indemnify *D.* from all debts, charges, and expences for the maintenance of *M.* his mother, she being then separate from *D.* by consent. *M.* brings a bill against *D.* and *J.* the son to have an allowance for her maintenance. The son by his covenant has taken upon himself the charge of maintaining *M.*, and stands in the husband's place, who is bound to give his wife an allowance if he voluntarily separates from her; and the son must be taken to be in nature of a trustee for the wife, so far as a reasonable allowance for her maintenance; and though the son offered to take her to his house, yet she is not bound to accept that offer; for though he stands in the place of the husband as to her maintenance, and a husband is not bound to allow any thing to his wife for maintenance, if he offers to take her home, yet in this case no such obligation lies upon the wife to live with the son; and though she refuses, she ought to have a reasonable allowance. *Per Cowper, C.* who ordered her to be allowed 200 *l. per annum*.

Mr. Viner says, Lord Cowper allowed the wife to keep the plate, &c. which she bought or was given to her by her friends during the separation.

M. 1717, Canc.
Williams v. Callow, 2 Vern. 752.
Vide Oxenden v. Oxenden,
 2 Vern. 493. *Nicholls v. Danvers*, 2 Vern. 671.

T. 1718, cor. Cowper, C.
Angier v. Angier,
Gilb. Eq. Rep. 152.
Proc. in Ch. 496.
 2 Eq. Abr. 150. pl. 8.
 In Lib. Reg. A. 6 Dec. 1717,
 this case is named *Engier v. Engier*.
Vide Gilb. Ch. 259. S. C.
Vide also Fitzer v. Fitzer,
 2 Atk. 511. *Head v. Head*,
 3 Atk. 547. and 1 Vef. 17.

10. A husband having used his wife with cruelty, and being an extravagant person, and wasting all his substance, the court decreed the interest of a trust-bond given for the wife's portion to be paid to the wife for her separate maintenance.

11. Bill by *prochein amy* of a wife against the husband for a specific execution of articles of separation, whereby the husband agreed to allow the wife 521. *per annum*. The articles were not executed by the wife, and the husband being desirous of a reconciliation, offered to take his wife home again. On his part it was contended, that alimony continued not after the parties were reconciled, and that to decree any thing like a separation was the proper business of the spiritual court only.

only. *Sed per cur.*—To decree a specific execution of these articles is not to invade the jurisdiction of the spiritual court: the intent of these articles was to save the expence of a suit there; the articles can be of no force but in equity; the wife cannot sue her husband at law, nor can it be pretended that the spiritual court may decree an execution of these articles. Though a court of equity cannot decree alimony, it can enforce the performance of the parties own agreement. Lord Chancellor referred it to a Master to settle a security for indemnifying the husband against the wife's debts, and decreed the arrears, and growing payment of the 5*l.* *per ann.*, to the wife, which his lordship said was not a decree of alimony or separation; for the parties might, whenever they thought fit, come together again, and then the articles would be no longer binding.

12. The estate of a deceased husband in the hands of another is subject to the funeral charges of his wife, *though she had a separate maintenance* which she disposed of by will.

T. 1723, cor. M. R.
Bertie v. Lord Chesterfield,
9 Mod. 31.
2 Eq. Abr. 152. pl. 15. 483. pl. 2.
Vide 1 Vern. 143. 309. 326.
2 Com. Dig. Chancery (2 M. 7).

13. *A.*, the wife of plaintiff, had, by cruel treatment, been forced to leave her husband with two young children, who she supported by her own industry. The husband and wife lived separate about thirty years, and the wife was, during the greatest part of that time, honestly employed as a servant in defendant's family. *A.*'s son, being settled in the world, on his death bequeathed two bonds, one of the *East India* Company, and the other of *L.* The *East India* bond he gave to *A.* his mother, whom he left executrix and residuary legatee; and *L.*'s bond he gave to plaintiff his father. The *East India* bond he directed should be to the separate use of his mother, *so that his father should have nothing to do with it.* *A.* proved the will, and gave *L.*'s bond over to her husband. The *East India* bond she gave to defendant her master, who was at length prevailed upon to accept it as a consideration to provide for her during the remainder of her life, which he verbally engaged to do. *A.* soon after died, and then her husband preferred the present bill against the defendant, insisting that *A.* had eloped from him, and had carried away the *East India* bond, which he charged to be his property. But it appearing in evidence that plaintiff had often visited his wife as

H. 1725, Canc.
Relfe v. Budden,
2 Eq. Abr. 153. pl. 17.
Bunb. 187.
S. C. nomine Relfe v. Budden,
Gro. & Rud. of Law & Eq. 120.
Ca. 16. *S. C. in totidem verbis.*

a servant in defendant's family, and the intention of the testator their son also appearing clearly from the testimony of the scrivener who drew his will that the *East India* bond was intended by him for the *separate use* of his mother, decreed that the agreement between *A.* the mother and the defendant, who had so long maintained and supported her, should be established in equity.

H. 1726, in Scacc.
Sir C. Moore v. Freeman & al.
 Bunb. 205.

2 *Eq. Abr.* 26. pl. 29.

3 *Bro. P. C.* 378.

Vide *Mitchell v. Mitchell*,
 Bunb. 207. where there was a
 gift by the husband to the wife
 without the intervention of trustees,
 and held good in equity.

14. *Sir C. M.* married the daughter of *E.* After some years cohabitation, Lady *M.* eloped and lived in a scandalous manner. *E.*, by his will in 1696, devised (*int. alia*) 6000*l.* to trustees in trust to pay the principal and interest as Lady *M.* should by deed or will appoint, free from the debts of *Sir C. M.*, or any after-taken husband. On 10th *August* 1716, *Sir C. M.* met with Lady *M.*, and took possession of her, and next day articles were executed between them, attested by four witnesses, that, in consideration *Sir C. M.* would permit his lady to live separate from him, she would settle 200*l.* *per ann.* on him for life, and pay him 1000*l.* out of her separate estate by quarterly payments. On 10th *November* the first quarter became due, and they met at the *Temple-hall*; and on 24th *November* the agreement was ratified by indorsement, and subscribed by four witnesses as before. On 10th *November* Lady *M.* made her will, and devised several specific legacies to *F.*, whom she made executor and residuary legatee. There having been a bill by Lady *M.* against *Sir C. M.* to set aside the articles, or that he should elect to take 200*l.* according to the articles, and a cross bill by *Sir C. M.* to carry the articles into execution, the cause was referred by the Chancellor of the Exchequer to the Judges, and, pending the reference, Lady *M.* died. The proceedings were revived against *F.* her executor, and now *per cur.* the articles were deemed a good execution under the will of *E.*, and *Sir C. M.* could not be excluded by the negative words; and Lady *M.* was bound though her trustees were not parties, the articles being an appointment pursuant to a power. But a point arising, whether the articles were not obtained by duress? An issue was directed, upon which it was found that the articles were fairly obtained.

Upon the equity referred there
 was a decree for *Sir C. M.* which
 was affirmed by the Lords with
 40*l.* costs. Bunb. Rep. 207.

H. 1726, *ex. King, C.*
Colmer v. Colmer, *M. f.* 121.
Vide *Sir Oliver Butler's case*,
 3 *Keb.* 187. cited.

15. Where a feme covert sues for alimony, it is no good plea that she has a separate maintenance or pin-money.

S. G.

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S. C. The husband voluntarily, and without cause, deserts his wife, and goes to *Maryland*, having first made a fraudulent assignment of all his real and personal estate in trust to pay his debts. The court decreed the wife a maintenance out of the estate so assigned, though she had the interest of 4000*l.* for pin-money by her marriage articles.

Vide 2 Vern. 671. 386. 1 Ch. Ca. 250. 2 Ch. Ca. 102. Nel. Rep. in Ch. fo. edit. 73 153.

16. One *Juxon*, a few years after his marriage, left his wife and two small children and went abroad, and did not see either her or them for fourteen years. The wife's mother during that time intrusted her with millenery and other goods, and permitted her to maintain herself and children out of the profits. The husband on his return broke open the wife's house, and took away all her goods, and the produce of the stock so lent by her mother. A bill (*inter alia*) was brought by the mother for the redelivery of the goods. The court held, that what the wife had acquired in her husband's absence to support herself and family is *her separate property*, and not liable to the disposition of the husband; and that what he had forcibly taken he must deliver in specie, or, if disposed of, he must pay her the value as set upon it by a Master.

17 Feb. 1737, cor. Hardw. C. *Cecil & Ux. & al. v. Juxon & al.* 1 Atk. 278.

17. *A.*, by articles before his marriage with *B.*, and in consideration thereof, and 6000*l.* her portion, conveyed lands to trustees for 99 years, upon trust to pay *B.* 100*l.* *per ann.* during her life for her separate use. The marriage took effect, and *A.* and *B.* lived happily together for more than twenty years, when disagreeing, *B.* withdrew herself, and went to *France*. The trustees, by her persuasion, brought an ejectment for recovery of the 99 years term; and there being great arrears of the annuity, were proceeding to judgment and execution, when *A.* filed his bill, (insisting that his wife was entitled to the annuity only during cohabitation, and offering, if she would live with him, to receive her kindly and forget the past,) and prayed an injunction against the proceedings in ejectment. The husband also commenced a suit against his wife in the ecclesiastical court for a restitution of conjugal rights, and upon her not appearing, a sentence of excommunication was pronounced against her. *Per* Lord Chancellor—This is entirely a new case, there is none like it. The two points to be considered are,

17 Feb. 1737, cor. Hardw. C. *Moore v. Moore*, 1 Atk. 272.

Ec 4

Whether

Whether equity ought, in any case, to restrain a legal remedy which a wife or her trustees have to recover a separate maintenance against the husband, and whether, from the evidence in the present case, there is any reason to restrain the defendant? There may be cases where a husband would be entitled to go into equity to restrain a wife's trustees from proceeding at law for her separate maintenance, and it would be reasonable so to do where the wife goes out of the jurisdiction of the ecclesiastical court and defeats their power; and there have been cases in which this court have awarded writs of *ne exeat regnum* in aid of the ecclesiastical jurisdiction. Separate maintenances are not to encourage wives to desert their husbands; for that would be to destroy the very end of the marriage contract. If a wife should elope and commit adultery, the ecclesiastical court can only punish her for contumacy; and in such case a husband would do right to apply to a court of equity to restrain the trustees from proceeding at law for her separate maintenance: but then the relief must arise from a plain case plainly proved, and plainly put in issue. But in the present instance, there is no incontinence, nothing is put in issue but the bare elopement; which leads to the second point, Whether, under such circumstances, there be any reason to lay such a restraint on the defendant? It was urged on the husband's behalf, that his wife eloped without cause, and that though she was even excommunicated by the spiritual court, as she was out of their jurisdiction, the husband had no fruit from his suit there. Lord *Hardwicke* said, he feared these separate provisions often occasioned the very evils they were intended to prevent; and if the plaintiff had made his wife uneasy in respect to her pin-money, which it appeared he did, though that did not justify her going away, it might be an excuse, and possibly the marriage agreement might be designed to provide for the wife if such a dissension should happen between the parties as might induce them to separate, though their quarrels might be of such a nature as are not proper to be laid before a court. As to the objection that the husband could have no benefit from his ecclesiastical suit, Lord *Hardwicke* laid no stress upon it; it was not instituted till eight years after the wife's departure, and until the trustees had brought an ejectment. It had rather the appearance of a foundation for a suit

suit here; for the ecclesiastical citations were only fixed on the church door, and the husband, who knew where his wife was, might have given notice to her, or to the attorney concerned for her in the civil suit. It does not appear that the husband ever made application to his wife since she separated to induce her to return*. There was another thing which had great weight with Lord *Hardwicke*. The husband paid the annuity after the separation, and for six months after his wife had left him; and when she petitioned for other money upon a different trust, he applied by a cross petition to stop it, alleging he had constantly paid her annuity, and offered to continue it. This is a strong presumption that he thought her excusable, at least, in separating from him. Under all these circumstances, Lord *Hardwicke* thought there was not sufficient foundation to give the plaintiff the general relief he prayed against the payment of the annuity, but that he ought to be relieved against the ejectment. His lordship referred it to a Master to see what was due to the wife for arrears of her annuity according to the marriage agreement, and to tax her costs at law; and upon payment thereof, together with the accruals of the annuity, decreed the injunction to be continued, and in default to be dissolved; and also that the plaintiff's bill be dismissed with costs: and further, that he do within fourteen days pay to defendant's solicitor 100*l.* on account of the arrears of the annuity now due.

* This distinguished the principal case from *Whorewood v. Whorewood*, 1 Ch. Ca. 250, where there was no contract for a separate maintenance; yet the husband before he filed his bill desired to be reconciled, and offered to cohabit with his wife and use her as such.

18. Upon a bill brought by a wife against her husband to have a maintenance out of her fortune upon a suggestion of *cruel usage* by him. Depositions to prove criminal conversation against the wife in excuse for his ill usage cannot be read, unless the criminal conversation is expressly charged by the answer, and made part of the husband's defence for his ill treatment of his wife.

10 Dec. 1740, cor. *Hardw. C. Watkins by her next Friend v. Ferdinando Watkins her Husband.*
2 Atk. 96.

S. C. Charging that the wife has behaved in an indecent manner will entitle the husband to receive evidence against her of criminal conversation; for it is not necessary to make the charge in gross terms.

Vide Sidney v. Sidney,
3 P. Wms. 269.

Though a husband has imposed on a wife (as in this case the husband did upon the marriage treaty) by giving her a bond void at law, yet equity will establish the agreement according to the intention of the parties.

Where

Where there is full proof of the wife's elopement and adultery, the court will not decree maintenance to the wife.

Where a witness is under a necessity of exculpating her own behaviour first, no regard ought to be paid to her evidence against the conduct of others; as, in the present case, a servant of the plaintiff, who though an eye-witness of her improper conduct before her marriage to the defendant, thought it not wrong to remain in her service after such marriage.

In *Colmer v. Colmer*, Mos. 121. Lord King framed a decree by way of analogy to a *ne exeat regno*, and impounded the fortune of the husband for the wife's maintenance, till he should think proper to return.

The husband having in this case possessed himself of the greatest part of the wife's fortune, and left the kingdom, the interest arising from the trust-money was directed to be paid to the wife till the husband thought proper to return and maintain her as he ought, and decreed the husband to pay costs.

22 Feb. 1742, cor. Hardw. C.
Fitzer v. Fitzer and another,
2 Atk. 511.

19. Lord *Rivers* by will gave an annuity of 50*l.* to the plaintiff, who afterwards, in 1726, married the defendant *Fitzer*. In 1738 they agreed to part, and by a deed of separation the husband covenanted to allow her 14*l.* *per ann.* out of his own estate, and 24*l.* more to be paid quarterly out of the annuity of 50*l.*, and 12*l.* *per ann.* to his daughter for her maintenance, to be paid quarterly. The bill is brought against the husband and *Stephens*, a creditor of his since the execution of the deed of separation, to have the trusts of the deed performed. Lord Hardwicke decreed according to the prayer of the bill as against the husband; and as to *Stephens*, that he should not release his claim upon the annuity till the plaintiff had paid him his debt.

It was a question in this case whether the deed of separation in 1738, and the trusts declared in it, were fraudulent under the statute of 13 *Eliz. c. 5*. Per Lord Chancellor—Every conveyance of the husband that is voluntary is fraudulent as against creditors, and though a husband is bound by law to maintain his wife and children, yet the funds, out of which the maintenance is to arise, are liable to creditors.

The decrees in the spiritual court for alimony and maintenance are only against the person of the husband, but affect not the husband's estate so as to take it from his creditors.

10 May 1743, cor. Hardw. C.
Tyrrel v. Hope, 2 Atk. 560.

20. In separate maintenances, the court must be directed by judicial determinations, and not by

by what they think of them in their private judgment.

21. A husband in a letter to his wife's father said, that though he had a great affection for his wife, he did not choose to be a witness to her infirmities; and therefore, during the time she lived with her father, he would allow her 100*l.* a quarter. The wife, having brought a bill to establish her separate maintenance, moved to be paid 600*l.*, being a year and half's arrears, to keep her till the cause was heard: but the husband having by his answer sworn that he was desirous of cohabiting with her, the court, in directing for the time past a sum of money to be paid her, would not order it as arrears, but 400*l.* in gross (a); and said, they should not direct it for the future.

Where the husband, in order to evade a sentence in the ecclesiastical court for maintenance, is going out of the kingdom, this court, on a bill filed by the wife, will grant a *ne exeat regno*.

After a decree for a separate maintenance, if a husband offers to cohabit with his wife, and promises to use her kindly, the court have refused to continue it in some instances.

Two years after (b) the wife's motion to be paid 600*l.* as before stated, she filed her bill for the arrears and growing payments of an annuity of 400*l.* from her husband, pursuant to an agreement between the husband and wife for that purpose. Upon the hearing of this cause the husband contended, that the agreement was not intended to exist during the joint lives of himself and his wife, but only during his occasional absence. Lord Hardwicke, in order to give the parties an opportunity of a reconciliation, adjourned the cause till 3d July 1747, when his lordship gave his opinion. 1st, That the agreement for the husband's allowance of this 400*l. per ann.* was merely during the husband's occasional absence. 2dly, As to the liberty prayed by the wife to live separately, and to have a separate maintenance established, his lordship said, there was no instance of a decree for establishing a perpetual separation between husband and wife, or to compel a husband to pay a separate maintenance, unless upon an agreement between the husband and wife; and even then unwillingly. 3dly, The obtaining a *supplicavit* (c) does not justify the wife's elopement from her husband; for it is a security

12 Feb. 1745, cor. Hardw. C.
Head v. Head, 3 *Atk.* 295.

(a) *Note*: The court were certainly guided by the offer in defendant's letter to allow his wife 400*l. per ann.*; but though eighteen months had elapsed since he wrote that letter, yet his answer had put in six months, by which he offered to take his wife home again.

Vide Colmer v. Colmer,
Mof. 121.

(b) 20 May 1747 this matter came again before the court upon a bill for the arrears of the separate maintenance, which the former suit sought to establish upon the undertaking in defendant's letter.

3 *Atk.* 547. 1 *Vesf.* 17.

(c) It appears that the dispute between the husband and wife in this case originated in the wife's being disordered in her mind; and upon her refusing to return home the husband discontinued the payment of her annuity, and endeavoured to seize her and confine her in a madhouse, whereupon she applied for and obtained a *supplicavit* against him.

(a) Lord Hardwicke here commented on the case of *Whorewood v. Whorewood*, 1 Ch. Ca. 250. (1), which was determined during the usurpation, when the power of the ecclesiastical court was suspended and devolved on the court of Chancery as to matters of alimony. That decision is therefore to be considered as a sentence of the spiritual court.

(1) In this case there was a separation in fact and maintenance agreed upon, yet Lord Bridgman suspended the payment on the wife's refusing to be reconciled.

18 May 1767, Dom. Proc.
Lambert v. Lambert,
6 *Ero. P. C.* 272.

14 July 1786, cor. M. R.
Stephens, Executor, v. Olive & Ux. & al.
2 *Bro. Ch. Ca.* 90.

T. 1788, cor. Buller, J. abf. C.
Compton v. Collinson,
2 *Bro. Ch. Ca.* 377.
1 *Eg. Abr.* 61.

Although Mr. Justice Buller did not in this case examine the several cases determined on articles of separation, yet in his general allusion to them, and in pronouncing his decree, he has afforded the reader much useful information, for which see the Reporter.

Note; It seems to have been determined that such a surrender with the assent of the husband is good by custom. *Vide Moor*, 123.

2 Mar. 1790, cor. Thurlow, C.
Coglar v. Coglar, 1 *Ves. jun.* 94.
(a) *Vide Anon.* 2 *Ves.* 489.
Anon. 1 *Bro. Ch. Ca.* 376.

On the part of the wife were cited by her counsel, *Read v. Read*, 1 Ch. Ca. 115, where a motion to *supercede* a writ of *ne exeat* was refused after a decree in the ecclesiastical court. *Sir Jerome Smith's case*, 2 *Ventr.* 345, where a *ne exeat* was granted on motion by the wife, who was suing for alimony in the ecclesiastical court. Lord Chancellor said, it had been done; but in

security taken for her on a supposition that they are to live together. As to the arrears of the separate maintenance, Lord *Hardwicke* decreed them to be paid, because some part of the husband's conduct was an excuse for the wife's not returning to him till his *judicial* offer of receiving her made by his answer, especially as the court had thought there were grounds for granting a *supplicavit*. His lordship further said, that having so decreed, the husband must take his wife home again, and treat her as his wife; but if she did not return to him in a month, then the maintenance should cease (a). On the other hand, if the husband should refuse to receive and maintain and treat her as his wife, then the separate maintenance should continue.

22. Where a husband by force, &c. compels his wife to execute a deed of separation, and thereby to accept of a very small maintenance, much inferior to his rank and fortune; a court of equity will relieve the wife against this deed, and refer it to a Master to settle a proper maintenance.

23. On a deed of separation, the trustees indemnifying the husband against the wife's future debts is a valuable consideration, and takes the conveyance out of the statute.

24. A feme covert having a power by articles of separation to dispose of her estate, the question in this case was, whether her surrender of a copyhold was good? Upon which a case was made for the opinion of the court of C. B. as to what estate passed under the surrender, will, and codicil of the testatrix.

25. Motion by a wife for a *ne exeat regno* against her husband, till a suit instituted by her in the ecclesiastical court for alimony, charging him with cruelty and adultery, should be determined, unless he should give security to abide the event. Lord Chancellor desired to know for what sum he should mark the writ (a). His lordship said, he knew it had been sometimes done at law upon affidavit to enable the judge to form an opinion; and by analogy to some cases (now a little exploded) a judge may increase damages. His lordship feared it could not be done under a notion of aiding the ecclesiastical

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ecclesiastical court, but if he could find a precedent he would do it.

that of Read v. Read; in the former of which cases Lord Hardwicke said, it was granted out of compassion to the wife and to aid the ecclesiastical court.

Anon. 2 Atk. 210. the writ was refused, though Sir Jerome Smith's case was noticed, as also

26. A creditor of a wife has a right in equity against her separate property, and against her husband in respect of it, but not beyond it, if notice. Plaintiff with notice of a separate allowance of the wife (a very weak woman) advanced to her wantonly beyond it. Upon proof that the plaintiff had received more than the demand she could make out, bill dismissed without account or costs, the value being trifling, and the plaintiff miserably poor.

5 Mar. 1791, cor. Thurlow, C. *Lillia v. Airy*, 1 Ves. jun. 277.

27. Articles of separation, by which the husband was to pay the wife 100*l.* a-year, decreed to be performed specifically (at the suit of the wife) though the husband offered, by his answer, to receive her again.

P. 1792, cor. M. R. *Guth v. Guth*, 3 Bro. Ch. Ca. 614. *Vide Head v. Head*, 3 Atk. 547. and 1 Ves. 17. *Seeling v. Crawley*, 2 Vern. 386. *Angier v. Angier*, Prec. in Ch. 497. *Rex v. Mead*, 1 Burr. 452.

Litter's case, 8 Mod. 22. *Strange*, 478. *Fitzer v. Fitzer*, 2 Atk. 511. *Stephens v. Olive*, 2 Bro. Ch. Ca. 90. *Fletcher v. Fletcher*, 20 Nov. 1788 (a).

(a) The case of *Fletcher v. Fletcher* appears to be this—A feme covert filed a bill against her husband and trustees for a specific performance of articles of separation. The husband filed a cross bill for the delivery up of the articles, and praying that the same might be cancelled. The wife returned to her husband and cohabited with him fourteen days; and there being other strong collateral circumstances in favor of the husband, Buller, J. abs. C. refused to decree a performance and dismissed the original bill, and upon the cross bill ordered the deed to be delivered up. No costs on either side.

28. No court has any original jurisdiction to give a wife a separate maintenance; but it may be given incidentally, as on a *supplicavit* in Chancery, or a divorce *à mensâ & thoro propter sevitiam* in the ecclesiastical court.

1 July 1793, cor. Loughb. C. *Ball v. Montgomery*, 2 Ves. jun. 195.

* Lord Chancellor in this case said, it is contrary to the established doctrine that a married woman should be a plaintiff in a

suit in Chancery for a separate maintenance. In *Lambert v. Lambert* in Dom. Proc. 6 Bro. P. C. 272. the cases on this subject were much considered.

29. The spiritual court has exclusive cognizance of the rights and duties arising from the state of marriage; a court of equity therefore has no jurisdiction upon a contract for separation between husband and wife simply, much less where it will affect a purchaser or creditor; but the jurisdiction holds in special cases; as where a third party covenants to indemnify the husband against the wife's debts, or a fortune accrues to the wife after separation, or the property is the subject of a trust.

H. 1797, cor. Loughb. C. *Legard v. Johnson*, 3 Ves. jun. 352. *Vide Whorewood v. Whorewood*, 1 Ch. Ca. 250. *Mildmay v. Mildmay*, 1 Vern. 53. *Hincks v. Nelthorpe*, 1 Vern. 204. *Head v. Head*, 3 Atk. 295. 547. *Seeling v. Crawley*, 2 Vern. 386. *Angier v. Angier*, Prec. in Ch. 496. *Sidney v. Sidney*, 3 P. Wms. 269. *Ball v. Montgomery*, 2 Ves. jun. 191. *Guth v. Guth*, 3 Bro. Ch. Ca. 614.

Fitzer v. Fitzer, *Taylor v. Jones*, 2 Atk. 511. 602.

30. Trust in a deed of separation to permit A. to receive the dividends of stock for the maintenance and support of the wife, with a covenant of indemnity

T. 1797, cor. M. R. *Hyde v. Price*, 3 Ves. jun. 437. 445. *Vide Corbett v. Poelnitz*,

1 Term Rep. B. R. 5. Hatchett v. Baddeley, 2 Blackst. 1079.
 Lean v. Schutz, 2 Blackst. 1195.
 1 Blackst. Com. 443. *et vide* notes to 12 edit. Caudel v. Shaw, 4 Term Rep. B. R. 361.
 Read v. Jewson, H. 13 Geo. 3.
 Gilchrist v. Brown, 4 Term Rep. B. R. 766. and Ellah v. Leigh, 5 Term Rep. B. R. 679. Hulme v. Tennant, 1 Bro. Ch. Ca. 16.

indemnity to her husband. A grant by her of an annuity out of the dividends was held void, being in defiance of the trusts of the deed.

A married woman living apart from her husband upon a separate maintenance cannot bind him by her contract.

Sec. 14. Of Elopement, Adultery, and Divorce.

P. 1682, cor. Finch, C.
Mildmay v. Mildmay, 1 Vern. 53.
 1 Eq. Abr. 67. pl. 4.

1. Plaintiff having obtained a sentence of divorce *à mensâ & thoro*, reciting therein that her husband had already settled 50*l.* *per annum* rent-charge on her, and the spiritual court having adjudged her 50*l.* *per ann.* more for alimony, she now exhibited her bill, suggesting that her husband had, to defraud her of this rent, procured the tenants to surrender their estates whereon the said rent was reserved, and prayed this rent might be made good to her by the decree of the court. Objected by defendant, that this settlement of the rent-charge was only in trust for the husband, and that no trust was declared in the deed for the wife; and that in truth she was a very lewd woman, and had eloped from her husband; and he by his answer offering to take her again, Lord Chancellor would make no order in it, but only that defendant should stand in the place of the tenants, and should admit the rents payable by the tenants still in being; and then she might proceed at law, and recover the rents there if she could.

P. 1700, cor. M. R.
Shute v. Shute,
Proc. in Ch. 111. 9 Mod. 43.
 2 Eq. Abr. 157. pl. 1.
Vide Sidney v. Sidney,
 3 P. Wms. 276.
 Head v. Head, 3 Atk. 547.
 Pettifer v. James, 2 A. 16.

2. Bill by the widow of an intestate claiming her dower of his real estate, and a share of his personal estate for herself and child. Administration had been granted to another, because the husband and wife were divorced *à mensâ & thoro*. *Per* Master of the Rolls—As to the dower, there is no impediment to a remedy at law, if the widow is entitled to it. Bill dismissed as to that. The granting of administration belongs to the ecclesiastical court, but the distribution to the court of Chancery. The wife is not such a wife as can claim administration in the ecclesiastical court until the sentence of divorce is repealed; therefore equity will not decree a distribution while such a sentence remains in force. Bill dismissed *in toto*.

§ 14. *Elopement, Adultery, and Divorce.*

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3. A wife divorced *à mensâ & thoro* for adultery, forfeits her right to her moiety and widow's chamber, which she is otherwise entitled to by the custom of *London*.

T. 1717, Scacc.
Pettifer v. James, Bunb. 16.
 2 *Eq. Abr.* 157. pl. 1. (n.)

4. It was held in this case, that a wife cannot either by herself or her *prochien amy* bring a *hœmini replegiando* against her husband. The very nature of the writ and proceedings shew it cannot be maintained. The husband by law has a right to the custody of his wife, and may confine her, but he cannot imprison her: if he does, it will be a good cause for her to apply to the spiritual court for a divorce *propter servitiam*.

P. 1718, Canc.
Atwood v. Atwood,
Proc. in Ch. 492.
Gillb. Eq. Rep. 149.

5. The husband being possessed of a term in right of his wife, was divorced *à mensâ & thoro*, and, he being about to sell his term, an injunction was granted to restrain him.

T. 1723, Canc.
Anon. 9 Mod. 43.
Note; The court at first denied the injunction, because the divorce *à mensâ & thoro* did not destroy the marriage. *Vide Milner*

v. Colmer, 2 P. Wms. 641. *Fitzer v. Fitzer*, 2 Atk. 514. *Dimmock v. Atkinson*, 3 Bro. Ch. Ca. 195. but afterwards granted it; for though the marriage continued, yet the husband did nothing as husband, nor the wife as wife. *Vide Co. Litt.* 46 351. *Hob.* 3. in marg. 1 *Vent.* 7. 18. 2 *Ca. in Ch.* 73. 2 *Vern.* 270. 3 *Atk.* 435. 3 *Willf.* 277.

6. Sir C. M. married the daughter of E.; after some years cohabitation Lady M. eloped, and lived in a scandalous manner. E. by his will 1696 devised (*inter alia*) 6000*l.* to trustees, in trust to pay the principal and interest as Lady M. should by deed or will appoint, free from the debts of Sir C. M. or any after-taken husband. On 10th August 1716, Sir C. M. met with Lady M., and took possession of her, and next day articles were executed between them, attested by four witnesses, that in consideration Sir C. M. would permit his lady to live separate from him, she would settle 200*l.* per annum on him for life, and pay him 1000*l.* out of her separate estate by quarterly payments. On 10th November the first quarter became due, and they met at the *Temple-hall*, and on 24th November the agreement was ratified by indorsement, and subscribed by four witnesses as before. On 10th November Lady M. made her will, and devised several specific legacies to F., whom she made executor and residuary legatee. There having been a bill by Lady M. against Sir C. M. to set aside the articles, or that he should elect to take 200*l.* according to the articles, and a cross bill by Sir C. M. to carry the articles into execution, the cause was referred by the Chancellor of the Exchequer to the Judges, and pending the reference.

H. 1726, in Scacc.
Sir C. Moore v. Freeman & al.
Bunb. 205. 2 *Eq. Abr.* 26. pl. 29.
Vide Mitchell v. Mitchell,
Bunb. 207. where there was a gift of the husband to the wife without the intervention of trustee, and held good in equity.

Lady

* *Note*; Upon the trial of this issue, which lasted nine hours, verdict that the articles were fairly obtained without duress.

Upon the equity reserved, there was a decree for Sir C. M. which was affirmed by the Lords with 40*l.* costs. Bunb. 207.

P. 1734, cor. Talbot, C. on appeal from the Rolls.

Sidney v. Sidney,

3 P. Wms. 268. 275.

2 Eq. Abr. 29. pl. 37. 158. pl. 3.

In *Cannel v. Buckle*, 2 P. Wms. 244. it was held that where a feme infant seized in fee covenants with the consent of her guardians, in consideration of a

settlement to convey her inheritance to her husband, if this be done in consideration of a competent settlement, equity will execute the agreement, though no action would lie at law to recover damages.

(a) In *Blount v. Winter*, *et contra*, 19 July 1781, the original bill was filed by trustees in marriage articles against the husband and wife, and the cross bill by the husband against the wife and children. The original bill prayed a performance of the articles, and the husband by his answer to that bill, and by his cross bill, resisted the performance so far as the articles made a provision for the wife, alleging and proving in the cross cause that she lived separate from him and in adultery. *Per cur.*—This is not a reason for non-performance of the articles as to the wife. And the court decreed accordingly in the original cause, dismissing the cross bill without costs. Reg. Lib. A. 1780, fo. 550.

In *Lady Powis's case*, Dy. 106, 107. Lady Powis eloped, but she and her husband being afterwards reconciled for a short time only, it was held that she was dowable, though the husband and wife never dwelt together again, provided she does not again elope.

(b) *Vide Watkyns v. Watkyns*, 2 Atk. 97. *Clarke v. Periam*, 2 Atk. 337.

Articles to settle lands in jointure are in nature of an actual jointure, which is not forfeited by elopement, like dower.

A husband does not forfeit his tenancy by the curtesy on leaving his wife and living in adultery, as a wife forfeits her dower by elopement, because the statute of *Westminster* 2. c. 34. does by express words in such case create a forfeiture of dower, but there is no act inflicting the forfeiture of a tenancy by the curtesy in the husband.

(c) In *Pendrel v. Pendrel*, cor. Lord Talbot, 5 Feb. 1733, the husband and wife by consent lived separately, and a child being born, an issue was directed to try whether the child was a bastard, and it was found a bastard, 2 Str. 925. In 1 Salk. 123. *inter* the parishes of St. George and St. Margaret, Westminster, it was held that a child begotten after a divorce *à mensâ & thoro* shall be taken to be a bastard; otherwise, after a voluntary separation, unless found that the husband had no access.

Wherefore this point is now settled for law.

In the case of a divorce *à mensâ & thoro*, baron and feme live separately, and the wife has a child; this is a bastard, for the court will intend obedience has been paid to the sentence during this time. But if in the case of a voluntary separation a child is born, this is legitimate. *Secus*, when the jury find the husband has no access to his wife (c).—Decreed the husband to perform the marriage articles, and to account for the timber he has cut on the wife's estate contrary to the articles. Costs to be paid out of the estate.

§ 14. *Elopement, Adultery, and Divorce.*

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8. Bill by Lady D. against her husband for a separate maintenance, charging by way of merit that she had behaved with the utmost duty and respect. Lord D. by answer, and in bar of his wife's equity, insisted that Lady D. *did not behave with that duty and affection which became a virtuous woman, much less as his wife*, and then entered into particular facts of adultery with one B. in support of his suggestion. The depositions were read in *cur. Canc. in Ireland*, and the bill was dismissed; but on appeal to the Lords here, they were not admitted.

1735, Dom. Proc.
Lady Donerail v. Lord Donerail,
cited in *Clark v. Periam*,
2 Atk. 333.

It appears that the Lord Chancellor of Ireland dismissed Lady Donerail's bill on the strength of their depositions, whereupon she appealed to the British House of Peers.

In Lord D.'s answer there was no *express* charge of adultery.

Vide Sidney v. Sidney,
3 P. Wms. 269.

On this case Lord Hardwicke observed, in *Clarke v. Periam*, that the virtue of a woman does not consist merely in her chastity, for she may be guilty of cruelty; and in this very case it appeared that the wife had not only used her husband with inhumanity, but beat him. A woman too may be addicted to gaming and other extravagance, which is not a virtuous behaviour.

Mr. Murray in argument said: Virtue, when applied to a wife, in all languages is emphatically applied to chastity.

Note; The case of *Clarke v. Periam* was not a case between husband and wife, but a bill filed by the plaintiff against the defendant as administratrix of her husband, to establish a bond given by the deceased to the plaintiff as *præmium pudicitie*.

9. A court of equity will not allow maintenance to a wife, where there is full proof of her elopement and adultery.

10 Dec. 1740, cor. Hardw. C.
Watkins v. Watkins, 2 Atk. 97.

10. The obtaining a *supplicavit* does not justify a wife's elopement from her husband, for it is a security taken for her on a supposition that they are to live together.

20 May 1747, cor. Hardw. C.
Head v. Head, 3 Atk. 530.

11. A wife's fortune was settled upon certain trusts, but no provision was made for payment of the interest during coverture. She left her husband's house, and lived in adultery. On a bill filed by the husband to be paid the dividends, the court would not decree payment without a provision for the wife, but ordered the future dividends to be paid into court, and the costs out of the accumulated dividends. The costs of the husband in a groundless suit against him in the spiritual court was also decreed to be paid out of the accumulation.

T. 1793, cor. Loughb. C.
Ball v. Montgomery & al.
4 Bro. Ch. Ca. 339.
2 Ves. jun. 191.
Vide Carr v. Eastbrook, 4 Ves. jun. 146. where Lord Loughborough refused to make any order at all in such a case.

No court has any original jurisdiction to give the wife a separate maintenance, but it may be given incidentally, as on a *supplicavit* in Chancery, or a

Vide Lambert v. Lambert,
6 Bro. P. C. 272.

VOL. I.

Ff

divorce

divorce *à mensâ & thoro propter sevitiam* in the ecclesiastical court.

T. 1793, in Scacc.
Chambers v. Bull, 1 Anstr. 269.
 Vide 1 Eq. Abr. 65. pl. 5.
 1 Ch. Ca. 296. cited.

12. Where the wife lived in adultery with the plaintiff, and under his influence, the husband was allowed to answer separate from her to a bill for an account of her property received by him.

B—a

Bastard*.

* *Bastardus nullius est filius; aut filius populi.*

Who shall be so deemed, and who are subject to or free from the Incapacities of Bastardy.

H. 1717, cor. Cowper, C.
Holder v. Holder,
 2 Eq. Abr. 359. pl. 12.
Vin. Abr. tit. Devise (D. b), pl. 8.

1. **T**HE father in his will taking notice that his son J. had much disobliged him, declares thus: *I do hereby resolve not to give him any more than 20l. a-year for life, to be paid him quarterly.* N. B. This was a bastard son, to whom the father had by a former will given 80l. a-year, but in the second will he took notice of his ill behaviour at the university, and devises that estate to his legitimate son. Per Master of the Rolls—The bastard son shall take nothing by this will, the words not amounting to a devise.

M. 1717, cor. Cowper, C.
 on appeal from the Rolls.
Fursaker v. Robinson,
 Prec. in Ch. 475.
Gilb. Eq. Rep. 139.
 1 Eq. Abr. 123. pl. 9.
Gilb. Ch. 256.

See this case more fully, *post*, tit. Copyhold.

Vide *Randall v. Randall*, 2 P. Wms. 465. *Fairbeard v. Bowlers*, 2 Vern. 202.

(a) In *Kettle v. Townsend*, 1 Salk. 187. it was held, that a man was not obliged to provide for his grandchildren as he was for his children, the latter being a debt of nature, which the former was not; *et vide* *Tudor v. Anson*, 2 Vef. 582. and *Elton v. Elton*, 3 Atk. 508. S. P.: but Lord Chancellor in the principal case was not satisfied with the difference, and said, that by the statute of 43 Eliz. a man was bound to provide for his grandchildren; and in *Watts v. Bullas*, 1 P. Wms. 61. M. R. said, a devise of a copyhold ought to be made good for grandchildren as well as children.

2. A. covenanted to convey his copyhold estate to his bastard child, and for further assurance. The child was admitted accordingly, but without a surrender; (whereby the copyhold did not legally pass;) A. then died. The natural daughter brought her bill against the heir, to supply the defective conveyance, the admittance being void for want of surrender. Per cur.—The daughter is a mere stranger, *nullius filia*, and not regarded by the law as a daughter; nor was the father under any obligation to provide for her as a child (a), for that obligation arises from the mutual contract of cohabitation

bitation

bitation during life, which is *marriage* (b); and there being no consideration for such conveyance (c), it is voluntary, and equity cannot give a remedy against the heir. Bill dismissed.

daughter was a bastard at common law, notwithstanding such subsequent marriage, yet it was contended on her behalf that the maxim of civil law ought in this case to prevail, *quod matrimonium subsequens tollit peccatum precedentis*.

(c) It also appeared in the cause that the conveyance was in consideration of 300*l.* paid by the daughter to her reputed father, but that fact was not proved.

3. Bastards are incapable to take till they gain a name by reputation (d). So a devise of 3000*l.* to all the natural children of a son by *Jane Stiles* extends not to bastards born after the making the will, nor to a child *in ventre sa mere*, for a reputation cannot be gained before a child is born.

S. C. And though the money was to be paid as testator should by deed appoint, yet testators' deed of appointment referring to the will was held as part thereof (e), and in the nature of a codicil explanatory of the will.

nereau v. Fonnerneau, Dougl. 487. *Cur. B. R.* on these authorities held, they could not unite the deed with the will. *Vincent v. Stansfeld*, and *Habergham v. Vincent*, 4 Bro. Ch. Ca. 353. 5 Term Rep. 92. S. C.

4. One having a bastard, leaves a personal estate to her executors in trust for the bastard, who dies intestate without wife or issue. The executor brings a bill against one who has part of this personal estate in his hands. The defendant demurs, because the Attorney-General and the administrator of the bastard are not parties. Demurrer disallowed, for that the executor has the legal title, and consequently may sue for the estate (f).

S. C. A bastard dies intestate without wife or issue; the king is entitled, and the ordinary of course grants administration to the patentee or grantee of the crown (g).

sent from the crown, and then the ordinary admits the patentee to administration; but the court thought this was rather of respect than of right, and they denied the opinion in *Henfloe's case*, 9 Co. 39. and held that administration originally belonged to the bishops, and the instance of some lords of manors is not a proof to the contrary.

To the principal case the reporter has subjoined the following query:—A church lease for three lives is granted to a bastard and his heirs, who dies without issue and intestate; what shall become of this lease? Shall it go to the administrator of the bastard or to the crown, or does the limitation to the *heirs* make any difference, or is it *casus omiffus* out of the statute of frauds and perjuries, and so remains liable to occupancy at common law? or, lastly, is the lessor entitled, though the lease being determined? for that the premises being granted to the lessee and his heirs during three lives, and the lessee being dead without heir, the lessor may re-enter in the same manner as where a grant is to a man and the heirs of his body for three lives, (in which case the heirs of the body shall take as special occupant;) remainder over, and the grantee dies without issue during the three lives, the remainder-man shall take. *Vide Low v. Burron*, 3 P. Wms. 262. and Mr. Cox's explanatory note thereon.

5. The question to be tried on this issue was, whether the plaintiff was heir at law of one T. P.?

F f 2

(b) It appears that in this case the daughter's mother was afterwards married to her reputed father, but that fact was not proved in the cause; and it was admitted at the bar, that though the daughter was a bastard at common law, notwithstanding such subsequent marriage, yet it was contended on her behalf that the maxim of civil law ought in this case to prevail, *quod matrimonium subsequens tollit peccatum precedentis*.

(d) *Vide* 1 Inst. 3. *et vide* Sir Moyle Finch's case in B. R. 6 Co. 68.

(e) Where there are limitations of an estate by one deed and further limitations by another deed, they cannot be coupled together. *Moore v. Packer*, 1 Raym. 37. *Goodman v. Goodwright*, 3 Burr. 873. *Doe ex dem. Fonnerneau v. Fonnerneau*, Dougl. 487. *Cur. B. R.* on these authorities held, they could not unite the deed with the will. *Vincent v. Stansfeld*, and *Habergham v. Vincent*, 4 Bro. Ch. Ca. 353. 5 Term Rep. 92. S. C.

H. 1718, cor. Parker, C. *Mitbam v. Duke of Devon*, 1 P. Wms. 529, 530. 2 Eq. Abr. 291. pl. 13. 331. pl. 5.

(f) *Note*; In the like case an executor, though a bare trustee, and though there be a residuary legatee, is entitled to sue for the personal estate in equity as well as at law, unless the *cestui que trust* will oppose it.

(g) *Manning v. Napp*, 1 Salk. 37. where it was held in B. R. that in case of an intestate without kindred the ordinary may dispose in *pious usus*; but the usual course is for some one to procure a patentee to administer; but the court thought this was rather of respect than of right, and they denied the opinion in *Henfloe's case*, 9 Co. 39. and held that administration originally belonged to the bishops, and the instance of some lords of manors is not a proof to the contrary.

It *Pendrell v. Pendrell*, 2 Stra. 915.

It was admitted, that plaintiff's father and mother were married, and had cohabited some months; that they parted, the wife staying in *London*, and the husband going into *Staffordshire*. At the end of three years the plaintiff was born; and there being some doubt whether the husband had not been in *London* within the last year, it was sent to be tried. Plaintiff rested on the presumption of law in favour of legitimacy, which was encountered by strong evidence of no access. It was agreed by the court and bar, that the old doctrine of being within the four seas should not take place, but the jury were at liberty to consider of the point of access, which they did, and found for the defendant (a).

(a) *Vide* *Rex v. Bedal Inhabitants*, 2 *Stra.* 1076. *Bull. N. P.* 112. *Lomax v. Holmden*, 2 *Stra.* 940. *Goodright v. Saul*, 4 *Term Rep.* 356. *S. P.* Antient authorities are not wanting to justify over-ruling the old doctrine. *Vide* *Harg. Co. Lit.* 126. a.

In the principal case defendant was allowed to prove the mother a woman of ill fame, as in *Pride v. Earl of Bath and Montague*, 1 *Salk.* 120. and *Alsop v. Bowtrell*, *Cro. Jac.* 541. but her declarations were not allowed to be given in evidence till she had been called, and denied them upon the cross examination, because the declarations of the wife without oath, *she being alive*, cannot be given in evidence in chief, even in a question of legitimacy, as they are not the best evidence; but after she had denied them upon cross examination they were admissible to impeach her credit. *Vide* *Bull. Ni. Pri.* 134. 294. *Clark v. Wright*, cited *Ca. temp. Hardw.* 80. Upon the question of a child's legitimacy, the father or mother having no interest in the cause, may be produced by either side to prove or disprove the fact and time of marriage. *Stapleton v. Stapleton*, *Ca. temp. Hardw.* 277. *Lomax v. Lomax*, *Bull. Ni. Pri.* 287. Lord Valentia's case in *Dom. Proc.* 1771, cited *Cowp.* 593. *Sacheverell's case*, *Bull. Ni. Pri.* 241. *May v. May*, *Bull. Ni. Pri.* 112. *Saint Peter's v. Old Swinford*, *Bull. Ni. Pri.* 112. and *Burr. Settl. Ca.* 25. So also to prove that the child was born prior or subsequent to a marriage had between the parents their testimony, or after their death evidence of their declarations, is admissible. *Vide* *Goodright ex dem. Stevens v. Moss*, *Cowp.* 591. But where the child is born in wedlock the evidence or declarations of the parents seem inadmissible to bastardize such issue. *Decr.* by Lord Mansfield to have been solemnly determined by the Delegates, *Cowp.* 592. 594. *Rex v. Reading*, *Ca. temp. Hardw.* 79. *Rex v. Rooke*, 1 *Will.* 340. But in these last cases the evidence of the wife went to exonerate the husband from the maintenance of the bastard, and some stress is laid upon her being the sole witness. This rule, however, where the child appears to be born in wedlock, has this exception, that the wife may be admitted to prove the fact of adultery from the necessity of the thing. *Rex v. Reading. Rex v. Rooke, ut supra.* It is said in *Bull. Ni. Pri.* 287. that in an ejectment *Wright, J.* admitted the father to prove the daughter legitimate. But as it is not stated whether the fact he was to prove was the time of the marriage, &c. that case does not seem a direct authority that a parent may be admitted where it may be necessary to support the presumption of legitimacy arising from a child's being born in wedlock, although they cannot give evidence to bastardize it.

P. 1734, cor. Talbot, C.
Sidney v. Sidney, 3 *P. Wms* 275.
2 *Eq. Abr.* 29. pl. 37. (n.)

(b) In *Pendrell v. Pendrell*, 2 *Stra.* 925. a husband and wife lived separately by consent, and a child being born three years afterwards, an issue was directed to try whether that child was a bastard, and it was found a bastard. So in the case between the parishes of Saint George and Saint Margaret, Westminster, *B. R.* 1 *Salk.* 123. it was held, that when a woman is separated from her husband by a divorce *à mensâ & thoro* the children she has during the separation are bastards, for the court intends a due obedience to the sentence, unless the contrary be shewn. But if baron and feme without sentence live separate, the children shall be deemed legitimate till the contrary be proved, as if a special verdict find a man had no access, it is a bastard. *Sic in casu inter Saint Andrew and Saint Bride's Parishes*, 1 *Stra.* 51. cor. Hall, C. J. Wherefore this point is now settled for law.

6. In the case of a divorce *à mensâ & thoro*, baron and feme live separately, and the wife has a child. This is a bastard, for the court will intend obedience has been paid to the sentence during this time. But if after a voluntary separation a child is born, it will be legitimate, unless the jury find the husband had during that time no access to the wife (b).

7. Testator

Capacities and Incapacities.

B—a 437

7. Testator by will gave an equal share of his real estate to his two sons *James* and *Charles*. These sons were illegitimate, and it was said the testator made a mistake in their names. *Per cur.*—In the case of a devise, any thing that amounts to a *designatio persone* is sufficient; and though bastards strictly are not sons, yet if they have acquired that name by reputation, in common parlance they are to be considered as such. As to the mistake of their names, though a man be mistaken in a devise, yet if a person is clearly made out by averment to be the person meant, and there can be no other to whom it may be applied, the devise to him is good.

M. 1737, cor. Hardw. C.
Rivers' case, 1 Atk. 410.

8. *A.* in 1715 made a settlement of a plantation in *America habend. to the use of William and John, two mulatto boys whom he had by a negro woman, their heirs and assigns for ever, paying to one mulatto boy Thomas, son to another negro, 50 l. per ann. from testator's death till Thomas should arrive at twenty-one, and then to pay him 500 l., with a clause that he does oblige himself, his heirs, executors, and administrators, to warrant and for ever defend the said plantation, negroes, cattle, stock, &c.*

24 July 1750, cor. Hardw. C.
Williamson v. Codrington,
1 Ves. 511. 517.

In 1718 an ejectment was brought against *A.* for the plantation, which he defended, but was evicted. He afterwards brought an ejectment himself in his own name, but that was compounded by his conveying the estate, in consideration of 1000 guineas.

After testator's death *William* brought his bill in his own right, and as a co-executor of his brother *John*, for an account of the rents of the plantation, and a satisfaction for the rent received by testator in his lifetime, and for the sum for which he sold his right, with interest from the time of the sale, and for the produce of the live stock on the premises. Lord Chancery thought he must proceed according to the strict rule, and decreed that plaintiff should have satisfaction for the value of the plantation, as it stood at the time of the sale, and the live stock from testator's death, with interest on the produce in sterling money. Referred to a Master to take the account, and report accordingly.

GENERAL REFERENCES from B—a.

Bail, see *Imprisonment, Recognizance.*

Bailiff—*Account, Master and Servant, Power and Authority, Sheriff.*

Bailment—*Pawn.*

Bankrupt, Act of—*Bankrupt.*

Bankers—*Trade.*

Barbadoes—*Colonies.*

Bargains, Catching—*Fraud, Heir.*

Bargain, and Sale—*Bankrupt, Deeds.*

Barretry—*Maintenance, Trade.*

Barrister—*Equity Officers.*

Barons—*Peers, Privilege of Parliament.*

— of the Exchequer—*Equity, Revenue.*

GENERAL REFERENCES from B—e.

Benchers, see *Court, Inns of.*

Bequest—*Legacy.*

B—i

Bill.

Sec. 1. Of the necessary and proper Parties to a Bill in Equity.

H. 1681, Canc.
Smith by v. Hinton, 1 Vern. 31.
1 Eq. Abr. 73. pl. 11.

1. Although an executor does not actually release, yet he must be made a party to the suit.

H. 1682, cor. M. R.
Barker v Wyld & al.
1 Vern. 140.

2. In this case it was admitted, that if there are three joint factors, and a man has a demand against them

them jointly, a bill against any one of them for the whole duty is good. But *quare*, if it be not only where the other factors are beyond sea?

3. On a bill to be relieved against a bail-bond fraudulently assigned by the sheriff, the plaintiff in the action at law must be a party.

M. 1682, cor. M R.
Israel v. Narbourne, 1 Vern. 87.

4. It is not a good cause of demurrer that one of the executors is not a party, when the plaintiff alleges he knows not who is the other executor, and prays the defendant may discover him.

M. 1682, cor. Finch, C.
Bowyer v. Court, 1 Vern. 95.

5. A trustee for three persons is called to an account; all the *cestuy que trusts* must be parties, for otherwise he might be thrice called to account for the same matter.

M. 1682, cor. Charleton, J. abf. C
Hanne v. Stevens, 1 Vern. 110.
1 Eq. Abr. 37. pl. 3. 72. pl. 4.

6. In a bill against executors touching a lease for years or other personal duty, though the executors are only executors in trust, it is not necessary to make the *cestuy que trust* or residuary legatees parties.

M. 1684, Cane.
Anon. 1 Vern. 261.

7. None but parties to a suit can be bound by it.

M. 1687, cor. Lds. Comrs.
Natchbolt v. Porter, 2 Vern. 113.

8. An executor in trust who was in this case a necessary defendant, being beyond sea, upon an affidavit made thereof, and that the plaintiff knew not whether he was living or dead, the plaintiff had an order on motion to proceed against the other defendants without prejudice, and afterwards had a decree, without bringing the absent defendant to hearing.

M. 1687, cor. Jeffries, C.
Walley v. Whalley & al.
1 Vern. 487.

9. Upon a bill for a specific performance of a covenant with *A.* for the benefit of *B.*, *A.* must be a party. *Secus*, if it had been only a promise, for then either *A.* or *B.* might have brought their action at law.

H. 1688, cor. Jeffries, C.
Cooke v. Cooke, 2 Vern. 36.
1 Eq. Abr. 73. pl. 8.

10. If a bill is brought for discovery of a bankrupt's estate, the bankrupt must be made a party.

H. 1688, Cane.
Sbarpe v. Gamon, 2 Vern. 32.

11. Plaintiff was a second mortgagee, contesting the validity of the first mortgage, but not having made the mortgagor a party, he was ordered to pay five marks costs. Plaintiff amended his bill, and set down his cause as an original cause, and not by way of appeal. Plaintiff had not served the mortgagor with process, he being beyond sea; the court

P. 1688, cor. M. R.
Thompson v. Baskerville,
3 Ch. Rep. 215.

therefore would not hear the cause, for no contempt can be without service of a *subpœna*, and plaintiff ought to have the mortgagor's answer, or run out all the process of contempt to a sequestration.

M. 1690, cor. Lds. Comrs.
Jackson v. Rawlins, 2 Vern. 195.
1 Eq. Abr. 72. pl. 1. (n.)

12. The rule in equity is stated in this case to be, that where two or more are liable to a demand, one alone cannot be made a defendant, but all the persons liable must be brought before the court.

M. 1692, Canc.
Conway v. Stroude, 2 Freem. 188.
2 Eq. Abr. 77. ca. 3.

13. Bill by a creditor against *B.* for a discovery of the estate of *J. S.* supposed to be in his hands. *B.* demurs, because no executor or administrator is a party. Held good; for if no person will administer, a creditor may; and it is necessary the executor or administrator should be a party, because they may perhaps shew how the plaintiff's demand is satisfied.

M. 1696, cor. Somers, C.
Cleland v. Cleland,
Prec. in Ch. 64. (n.)

Vide Humphreys v. Humphreys, 3 P. Wms. 349. where it was held not sufficient to make the person entitled to administration a party, but that administration must actually be taken out.

14. In this case a surviving wife had not taken out administration to her deceased husband; and an objection was made for want of parties, for that no administrator of the husband was made a party to the suit; but the wife being called administratrix in the bill, and having by answer confessed that she had possessed her husband's personal estate, and disposed of it, (and being the person by law entitled to administration,) though she denied by answer that she had taken administration, the court over-ruled the objection.

M. 1698, cor. Somers, C.
Cowslad v. Cely, Prec. in Ch. 83.
1 Eq. Abr. 73. pl. 18.
2 Eq. Abr. 165. pl. 3.

(a) It is presumed from the nature of this case, that the other executor was beyond sea, but it is not so expressed.

(b) Defendant's counsel objected, that though a bill might be brought against one factor without his companion, if he were beyond sea, yet that had been allowed only from necessity, but that it was otherwise in case of executors. *Sed per* Lord Chancellor—The reason is the same here as in case of joint factors, and it is doubtful whether a foreigner can be served with a *subpœna* in a foreign country. *Vide Darwent v. Walton*, 2 Atk. 510.

15. Bill by a residuary legatee against one executor only, without his co-executor, for an account of his own receipts and payments. Defendant insisted that his co-executor ought to have been a party (a). *Per cur.*—The running out of process in this case is purely matter of form (b). The cause shall go on; and if upon the account any thing appear difficult, the court will take care of it.

M. 1699, Canc.
Parker v. Blackbourne,
Prec. in Ch. 99.
1 Eq. Abr. 73. pl. 17. 2 Vern. 369.

16. If a necessary defendant be prosecuted regularly to a sequestration, the plaintiff may go on without him against the other defendants.

T. 1700, Canc.
Dayrell v. Champness,
1 Eq. Abr. 400. pl. 4.

17. *A.* tenant for life, remainder to *B.* for life, remainder to the first and other sons of *B.* in tail male,

male, remainder to *B.* in tail, &c. *B.* (before the birth of a son) brings a bill against *A.* to stay waste; *A.* demurs, for that *B.* had no right to the trust, and none that had the inheritance was a party. Demurrer over-ruled, because waste is to the damage of the public, and *B.* is to take care of the inheritance for his children, and may himself have an eventual interest in the estate.

Vide Mollineux v. Powell, cor.
King, C. P. 1730, 3 P. Wms.
268. (n.)

18. Where one is made a party to a bill against whom the plaintiff can have no decree, but may examine him as a witness, he may demur.

It is a principle that a mere witness shall not be made a party to a bill. *Vide Newman v. Godfrey*, 2 Bro. Ch. Ca. 332.

T. 1700, Canc.
Dr. Steward v. East India Company,
2 Vern. 380.
1 Eq. Abr. 40. pl. 8. 73. pl. 14.
Vide Newman v. Godfrey,

19. Upon a bill brought against an assignee of a lease to pay the rent, and perform the covenants, the original lessee ought to be a party; but if the assignee has divided his interest into a great number of shares, it is not necessary to make all the sharers parties.

P. 1701, cor. Wright, C. S.
City of London v. Richmond,
2 Vern. 422.
2 Eq. Ca. Abr. 86. ca. 6. (n.)
16 Vin. 250. pl. 15. *Affirmed in Parliament*, 1 Bro. P. C. 30.

N. B. In this case it appears the lessee had branched his interest into nine hundred shares.

20. The want of proper parties in the original cause is good ground of appeal; but the party appealing on that ground must procure the answer of the party whom he shews to be necessary.

20 April 1701, Dom. Proc.
Handcock and another v. Sbaen,
Bart. Administrator,
Collet's P. C. 132.

S. C. Where it is alledged that the person making the conveyance was but tenant for life, with remainder in tail to another, the alledged remainder-man must be a party to any bill in which that question is agitated.

21. Where a bill was brought by some few tenants of *Greystock* manor against the lord, to settle the customs as to fines upon death and alienation, an issue was directed at law, and the fines determined; but it was insisted upon, that there being but some of the tenants parties to the bill, the rest would not be bound by this trial. But C. S. held that they would all be bound.

M. 1701, cor. Wright, C. S.
Brown v. Howard,
1 Eq. Abr. 163. pl. 4.

22. Plaintiff's intestate obtained a decree against defendant for a sum of money, and also for conveying lands and delivery of deeds, but before any thing was done he died. Plaintiff brought a *sci. fa.* to revive; defendant demurred, because the heir was not a party, and a decree cannot be revived by parts. The court allowed the demurrer as to the realty, but ordered the decree to be revived as to the personalty.

M. 1701, Canc.
Ferrers v. Cherry,
1 Eq. Abr. 3. pl. 11.
2 Vern. 384. and 1 Eq. Abr.
331. pl. 5. S. C. but not S. P.

P. 1702, cor. Wright, C. S.
Quintine v. Yard,
 1 *Eq. Abr.* 74. pl. 19.

23. B. S. in 1661 made his will, and among other legacies devised an annuity of 20*l.* to C., payable quarterly, and gives other legacies, and then has this clause, *all the rest of my real and personal estate not before bequeathed (my debts being paid) I give to my brother J. S.*, and makes him sole executor; and he paid the annuity several years, and made his will, and charged all his real and personal estate with this annuity, and devised all his real and personal estate in *England* to his two daughters the defendants, and all in *Barbadoes* to his daughters there, who were not parties to this suit. The defendants paid the annuity several years, and then stopped, pretending that the words in the will of B. S. did not charge his real estate with the annuity, or if they did, yet the personal estate ought to be first exhausted, which it did not appear to be, and the real and personal estate in *Barbadoes* being equally liable by the will of B. S., the daughters there ought to have been parties, for they might have made satisfaction; or they ought to be before the court, that they might be decreed to pay their proportion. *Per cur.*—That is not practicable in this case, and ought not to be required. The lands were charged by the will of B. S., and if any satisfaction has been made by the daughters in *Barbadoes*, defendants must shew it.

1703, cor. Wright, C. S.
Dawson v. Franklyn,
 2 *Eq. Abr.* 631. pl. 2.
 16 *Vin. Abr.* 257. pl. 71.

24. In directing an issue, a *bare trustee* ought not to be a party, for that might hinder his being an evidence.

4 Mar. 1707, Dom. Proc.
African Company v. Dockwra,
 Colles's P. C. 327.
 4 *Vin. Abr.* 402.
 15 *Vin. Abr.* 316.
 Prec. in Ch. 221. S. C. but
 not to this point.

25. The captain of a ship of war is sent out to assist the *African* company, and he seizes A.'s ship and cargo, and delivers them to the company, who confiscate them. A. afterwards recovers a full value against the captain in an action of trover; the captain brings a bill against the company to be reimbursed. The company shall not complain that they were not parties in the action at law; nor that B. who owned part of the cargo was not a party in equity.

M. 1705, Canc.
Leonard v. Earl of Suffex,
 2 *Vern.* 527.
 1 *Eq. Abr.* 12. pl. 8.

26. A. is tenant in tail of a trust-estate, remainder to his sons. A. before a son born brings a bill against the trustees, and an account is decreed and afterwards taken. This account shall bind the sons; for all persons that could be made parties were parties in the suit.

M. 1707, cor. Cowper, C.
Gawler v. Wade, 1 P. Wms. 99.
 2 *Eq. Abr.* 165. pl. 4.

27. One seised of lands in fee binds himself and his heirs in a bond, and devises his lands to J. S. in

in fee, and dies. In a bill brought by the obligee upon the statute of 3 & 4 W. & M. c. 14. to affect the real assets in the hands of the devisee, the devisor's heir must be made a party (a).

though a bill in equity is as an action at law; otherwise if there were no heir, and it might be otherwise too, if the bill had charged that the plaintiff had made inquiry and could find no heir.

(a) *Sic* in *Warren v. Stawell*, 2 Atk. 125.

28. Bill by a trustee to compel the specific performance of marriage articles, the *cestuy que trust* was not made a party; *ergo*, it was prayed the cause might not go on after opening the bill and answer, because if the bill should be dismissed, the *cestuy que trust* would not be bound by it, and so defendants would be liable to another suit for the same cause. Decreed plaintiff to pay the costs of the day, and make *cestuy que trust* a party, and the former bill, answer, and deposition to stand.

29. *A.* being seised of houses in *London*, leased them for 30 years to *B.*, who covenanted to repair, and build, and keep them in good repair. *B.* built, and devised the term to his wife, and died. The wife married *C.*, and *C.* being indebted to *D.*, *D.* sued him; and upon a *sci. fa.* the sheriff assigned the term to *E.* in trust for *D.* The assignee assigns it to a pauper, the houses being out of repair, and the rent in arrear, for execution of the articles for repairs, and an account for the arrears of rent, the bill was brought. Objected, that the executors of the lessee were not made parties. Lord Chancellor said, he believed that *B.* the lessee died insolvent; but to make the proceedings unexceptionable, it would be very proper to have them before the court, for that it did not appear to him but that the plaintiff hath had a satisfaction at law against the executors; and if so, the plaintiff's equity will be their equity. Decreed, the bill to be amended, and executors to be made parties.

30. A man proposed to raise a bank, and to procure an act of parliament to establish and settle it. About fifty joined with him, and were at equal expences. This project being likely to take effect, two hundred and fifty more subscribed to raise a fund; but in effecting the project about 6000 *l.* were lost, and so it dropped. Then the persons who were this 6000 *l.* out of pocket exhibited their bill against sixteen of the two hundred and fifty subscribers to bear their proportion of the loss. Moved, that the bill should abate for want of parties; but over-ruled, for

Lord Chancellor said, it is the act of parliament that makes this assets in the devisee's hands, and that requiring the heir to be made a defendant, the remedy therein prescribed must be followed; this,

H. 1708, cor. Cowper, C.
Kirk v. Clark, *Pres.* in *Ch.* 275.
2 *Eq. Abr.* 165. pl. 5.

It was said a trustee need not in all cases be a party, especially where the *cestuy que trust* will undertake for him.

P. 1709, cor. Cowper, C.
Saintry v. Grammer,
2 *Eq. Abr.* 165. pl. 6.

If a lease of houses much out of repair is assigned to a man, and the assignee at the time he takes the assignment does not know in what ruinous condition the houses are, in that case he may drop the term as he can: *Secus*, where he receives the houses in good order, and after they do become ruinous he assigns them to a pauper. *Per* Lord Chancellor. *Ibid.* Where a man can have his remedy at law, a court of equity will not assist him; and the law is the same, whether the lessor assigns over the term, or it is sold by the sheriff; for those who claim under the lessee are bound by the covenants. *Per* Lord Chancellor. *Ibid.*

P. 1709, cor. Cowper, C.
Anon. 2 *Eq. Abr.* 166. pl. 7.

for the plaintiffs only pray that defendants may bear their proportion of the loss, which will appear before the Master, as well as if all the two hundred and fifty subscribers were there; and so it can be no prejudice to those defendants; and if there should happen to be any disproportion in the accounts, the party grieved may have his remedy by bill.

P. 1709, cor. Cowper, C.
Anon. 2 *Eq. Abr.* 166. pl. 8.

31. An exception was taken to a bill for want of parties, because the remainder-man expectant upon an estate-tail was not a party, and one end of the bill was to impeach a settlement. The exception was over-ruled, because such remainder-man is not regarded in equity, neither can he be bound.

H. 1710, in Scacc.
Clarvill v. Trelawney, Bunb. 70.
2 *Eq. Abr.* 631. (n.)

32. An impropiator must be a party to a bill brought against his lessee to establish a *modus*, for this court will not bind the inheritance of any person unless he is before the court.

H. 1710, Canc.
Lady Selyard v. the Administrator of Harris & al.
2 *Eq. Abr.* 74. pl. 20.

33. Sir E. F. settled his estate upon P. G. and H., upon trust, first to pay his debts, then to pay certain portions and legacies, and then to lay out the overplus in the purchase of lands in trust for his first and other sons, &c. and their issue; and for want of issue, in trust for himself and his heirs. P. G. and H. being dead, the plaintiff, his grand-daughter and heir at law, brought her bill against the administrator and heir at law of H., who alone acted in the trust, to discover lands purchased with the overplus money. Objected that the representatives of the other trustees ought to have been brought before the court. But the plaintiff requiring only an account of what came to the hands of H., and of his receipts and disbursements only, and not of any joint receipts or transactions by him with the other trustees, the objection was over-ruled.

1712, Canc.
Attorney-General v. Shelly,
1 *Salk.* 163.
Vide Attorney-General v. Wy-
burgh, 1 P. Wms. 599. S. P.
accords.

34. In a bill brought on behalf of a charity it is not necessary to make all the tertenants parties, for the charity shall not be put to that difficulty; but the tertenants may, if they seek a contribution, undertake to make them parties to the information, or help themselves by such course as they shall think fit.

7 Mar. 1717, cor. Cowper, C.
Ward v. Reily,
2 *Eq. Abr.* 631. pl. 3.

16 *Vin. Abr.* 253. in a note to pl. 46.

This does not appear to be correctly stated; *vide* 1 Bro. P. C. 578. where it is said that the respondent, paying the appellant's costs, should be at liberty to bring the cause again to a hearing against Lord Fingal, to whom they had attorned:—it does not appear that the bill was dismissed.

35. A bill was dismissed because the tenants were only parties, and not the lord, they having attorned to a new title against their first lessor.

36. Appel-

36. Appellant to pay the *costs of the day* for want of proper parties, and to be at liberty to amend his bill.

9 Mar. 1718, cor. Cowper, C.
Morris v. Nesbitt,
2 Eq. Abr. 632. pl. 4.
16 Vin. Abr. 257. pl. 2.

37. Where a bill wants proper parties, the court can (a) either dismiss it without prejudice to another bill, or allow an amendment on payment of the costs of the day.

P. 1718, cor. Parker, C.
Stafford v. City of London,
1 P. Wms. 428. 1 Stra. 95.
2 Eq. Abr. 1. p. 3. (n.) 166. pl. 9.
244. pl. 18.

(a) *Vide contra*, Anon. 2 Atk. 15. where Lord Hardw. said a bill was never dismissible for want of parties, and mentions two decrees of dismissal for that cause which were reversed by the Lords, one of which seems to be *Green v. Poole*, 4 Bro. P. C. 122.

4 Vin. Abr. 402. pl. 21.

38. Where the churchwardens of a parish are sued in their official capacity, it is not necessary to make the annual successive churchwardens parties from time to time, as they may be renewed during the continuance of the suit.

T. 1718, cor. M. R.
Case of Radnor Parish in Wales,
2 Eq. Abr. 203. pl. 3.
4 Vin. Abr. 529. pl. 10.

39. *A.* having outlawed *B.* brought his bill against him, and also against *C.* his trustee, to subject an annuity (which had been devised to *B.* out of personal estate) to *A.*'s debt.

T. 1718, cor. Parker, C.
Balk v. Wastal, 1 P. Wms. 445.

The Attorney-General ought to have been a party (b).

(b) *Sic in Rex v. Fowler*,
Bunb. 38.
— *v. Bromley*, 2 P. Wms. 269.

40. In a suit on behalf of a charity for the arrears of a rent-charge, it is not necessary to make all the tenants of the estate charged, parties.

H. 1719, cor. Parker, C.
Attorney-General v. Wyburgh
& al. 1 P. Wms. 599.
2 Eq. Abr. 167. pl. 11.
Vide Attorney-General v. Shelly, 1 Salk. 162. S. P.

41. Bill to establish a will, and to perform several trusts, some of them relating to charities: the bill was brought by some of the trustees against other trustees, and several *cestui que trusts*. The Attorney-General need not be made a defendant; for some of the trustees of the charity are made defendants, and there may be a decree to compel an execution of the trusts in the will relating to these charities. If there should be any collusion between the parties in relation to the charity, the Attorney-General, notwithstanding a decree, may bring an information to establish the charity, and set aside the decree; so if he is made a defendant, if there be collusion. Objected, that one of the trustees was not brought to hearing. Answered, that he is named a defendant in the bill, but being beyond seas, is not amenable to the process of the court, and therefore plaintiff may proceed without him: besides, the trustee is one of the plaintiffs in the cross

T. 1719, cor. Parker, C.
Monill v. Lawson,
2 Eq. Abr. 167. pl. 13.
4 Vin. Abr. 500. pl. 11.

His lordship said, where a bill is brought on behalf of such a charity to establish it, it must be in the name of the Attorney-General, *ex necessitate rei*, because there are no certain persons entitled to it who can sue in their own names; but in the principal case there is no necessity; and seemed to admit that where an estate is devised to trustees for charities to persons certain, who are capable to sue or be sued, such persons ought to be made defendants as well as other *cestui que trusts*. Ibid. In the margin of this case of *Monill v. Lawson*, Mr. Viner says, "Note; Parker, C. seemed to take a difference, where trustees of the charity are appointed by the donor, and where no trustees are

"appointed, but the lands devised cross cause, and so is before the court; *cur.*
 "immediately to charitable uses; *concessit.*
 "in the latter case there can be
 "no decree, unless the Attorney-General be made a party; but otherwise where trustees are ap-
 "pointed by the donor. This cause proceeded to a hearing, and the objections were over-ruled. *Per*
 "Parker, C." *Ibid.*

M. 1719, cor. Parker, C.
Fowkes v. Pratt, 1 P. Wms. 593.
 2 Eq. Abr. 1. pl. 3.

42. A plaintiff may complain and tell stories of whom he pleases, but they only are defendants against whom process is prayed.

M. 1719, in Scacc.
Whistler v. Webb & al.
Bunb. 53.

43. Bill for a redemption; defendant states he was only a trustee. Objected, that the *cestuy que trust* should have been a party, and plaintiff might have amended his bill upon the discovery of that fact by the answer. Bill dismissed.

P. 1720, cor. M. R. abf. C.
Duncombe v. Hansley,
 3 P. Wms. 333. (n.)

44. Bill by a mortgagee against the heir of a mortgagor to foreclose, it was objected, that the executor of the mortgagor ought to be a party, because it did not appear but that he might have paid the debt. *Sed per* Master of the Rolls (a)—There is no necessity for making the executor of the mortgagor a party (b), because the bill being only to foreclose the equity, the plaintiff need only make him a party who has the equity, viz. the heir; and the course is so. Neither is the mortgagee bound to intermeddle with the personal estate, or go into an account thereof. If the heir would have the benefit of any payment made by the mortgagor or his executor he must prove it.

(a) Mr. Goldsborough, the Register, being in court, agreed with his Honor's decision as to the practice in this case.

(b) *Vide* Fell v. Brown,
 2 Bro. Ch. Ca. 279.

12 Mar. 1720, Canc.
Butler v. Pendergrafs,
 2 Eq. Abr. 632. pl. 6.
 16 Vin. Abr. 248. pl. 5.
 2 Bro. P. C. 170.

45. A nominal person only who has no interest is not a necessary party, and a suit may go on without him.

M. 1720, Canc.
Anon., 2 Eq. Abr. 167. pl. 15.
 6 Vin. Abr. 239. pl. 5.

46. Where a bill is brought for surrender of a copyhold estate held for lives the lord must be made a party, because, when the surrender is made, the estate is in the lord, and he is under no obligation to regrant it; *contra* in case of copyholds of inheritance, for there the lord need not be a party.

M. 1720, cor. Parker, C.
Heath v. Percival,
 1 P. Wms. 684. (n.)
 2 Eq. Abr. 167. pl. 14.
 630. pl. 2. (n.)

47. An executor in trust was outlawed, and a witness proved he had inquired after him, but could not find him, which was deemed a full answer to the objection that he was not made a party to the suit.

26 June 1721, Dom. Proc.
Edgeworth v. Edgeworth,
 2 Bro. P. C. 326.

48. Where a person derives title under a dormant settlement, all the remainder-men in that settlement,

settlement; as well as all mesne incumbrancers on the estate, must be made parties to the suit.

16 Vin. Abr. 254. ca. 52.
2 Eq. Abr. 632. ca. 8.

49. But where an estate is subject to several incumbrances, one incumbrancer may sue without making the rest parties; at least it is cured by a decree, directing an account to be taken of all the incumbrances affecting the estate.

12 July 1721, Dom. Proc.
Odell v. Graydon,
2 Bro. P. C. 343.
16 Vin. Abr. 254. ca. 51.
2 Eq. Abr. 632. ca. 7.

50. Bill for a portion of tithes in a neighbouring parish dismissed, because the vicar of that parish was not a party.

Note also; In *Green v. Poole*, 4 Bro. P. C. 122. a decree of dismissal of a bill in the Exchequer for want of parties was reversed in the Lords (1 Feb. 1733), and it seems to be the practice in Chancery to suffer the cause to stand over on paying the costs of the day. *Vide Anon.* 2 Atk. 15.

T. 1722, in Scacc.
Baily v. Worrall, Bunb. 115.
Note; Upon application the bill stood over, with liberty to amend.

51. Bill by the treasurer and managers of the *Temple Mills Brass Works* in behalf of themselves, and all other proprietors, for an account. The concern originally consisted of eighteen shares, but were branched into eight hundred. Demurrer, for that all the proprietors were not parties, and that every one might call for an account, and so perplex the defendants by a multiplicity of suits. Demurrer disallowed; 1st, For that the bill, being on behalf of the plaintiffs and the rest of the proprietors, they were in effect parties. 2dly, For that it would be impracticable to make all the parties defendants by name, for then there might be perpetual abatements by death and otherwise.

T. 1722, Canc.
Chancey v. May,
Prec. in Ch. 592.
Vide City of London v. Richmond, 2 Vern. 422. Leigh v. Thomas, 2 Vef. 312. Anon. 3 Atk. 572. Cullen v. Duke of Queensberry, 1 Bro. Ch. Ca. 101.

52. Bill for tithes by the bishop and sequestrator during the incapacity of the incumbent. Demurrer for that the plaintiff had no title to tithes, but dismissed because the incumbent was not made a party, though the demurrer did not shew that expressly for cause.

M. 1723, in Scacc.
Bishop of London and another v. Nicbolls, Bunb. 141.

53. A person cannot bring a bill for an account against one co-executor without the other, either as residuary legatee or as a creditor.

Vide Yates v. Compton, 2 P. Wms. 308. Co. Litt. 113. (n.) *Jones v. Goodchild*, 3 P. Wms 33. *Knight v. Knight*, 3 P. Wms. 331. Mitf. Plead. 144. 146. 220. *Ashurst v. Eyre*, 2 Atk. 50. 3 Atk. 341. S. C. *Plunkett v. Pynson*, 2 Atk. 51.

H. 1724, Canc.
Scurry & Ux. v. Morfe,
9 Mod. 89.
2 Eq. Abr. 168. pl. 17. 212. pl. 7.

54. Bill by a vicar against a sequestrator for an account of the profits during the vacancy, the bishop must be a party.

a bill for tithes alone, for he is only a bailiff, having no interest, and being accountable to the bishop.

H. 1724, in Scacc.
Jones v. Barrett, Bunb. 192.
Note; It was said in this case that a sequestrator could not bring

55. Bill to establish a custom for the owners and occupiers of lands in a certain parish to keep a bull

M. 1724, in Scacc.
Spendler & al. v. Potter,
Bunb. 181.

a bull and boar, the owner of the inheritance must be a party.

P. 1725, cor. Gilbert, Ld. Comr.
— v. Bromley, 2 P. Wms. 269.
Vide Balch v. Wastall, 1 P.
Wms. 445. and Rex v. Fowler,
Bunb. 38. S. P.

56. *A.* outlaws *B.* his debtor, and *C.*, having goods of *A.* in hand, *B.* brings a bill to discover these goods. Demurrer, for that *B.* has no grant from the crown, consequently has no title, and also for that the Attorney-General is not a party. Demurrer allowed.

T. 1725, in Scacc.
Rogers v. Linton, Bunb. 200.

57. Bill for an account of a freeman's personal estate. One of his sons by the second wife was named a party, but being beyond sea never answered, nor was he served with process. The court gave leave to hear the cause without him; for if he had any right, he might go before the Deputy Remembrancer on the account.

M. 1725, cor. King, C.
Tates v. Compton,
2 P. Wms. 308.
Sel. Ca. in Ch. 54.

2 Eq. Abr. 168. pl. 20. 457. pl. 2.
The heir being only a trustee to the use of the will since the executor renounced, it was not necessary he should be a party. Sel. Ca. in Ch. 54.

(a) Vide Harg. Co. Lit. 113. (a), note 2.

Note; The reporter says, *Quære tamen?*

58. One devised that his executors should sell his lands, and left two executors, one of whom died, and the other renounced; and then administration was granted to *A.*, who brought a bill against the heir to compel a sale. Objected, that the renouncing executor, in whom the power of sale collateral to the executorship (a) was vested, ought to be made a party.

This objection was over-ruled, there being no estate but only a power devised to the executors.

M. 1725, cor. King, C.
Collins v. Griffiths,
2 P. Wms. 313.
2 Eq. Abr. 168. pl. 19. 198. pl. 2.
Vide Madox v. Jackson, 3 Atk. 406.

59. Two obligors in a bond bound jointly and severally, and one dies. The executors of the deceased obligor may be sued in equity for the debt without making the surviving obligor a party.

P. 1726, in Scacc.
Cutbbert v. Westwood & al.
Gilb. Rep. in Eq. 230.
2 Eq. Abr. 632. pl. 9.

It was also objected that the occupiers as well as the land-owners should have been parties, because a decree against the land-owners would not affect the occupiers. To which it was answered, it would be endless to make all the occupiers parties; and if that was necessary the plaintiff could never come at his right; for there were great numbers of them, and any single one dying would put the plaintiff to his bill of revivor: and cited Biscoe v. Undertakers of the Land Mark, cor. Wright, C. S. who said he would not bring them all before the court, since the right might be determined by having a few, which the court thought reasonable. And per cur.— Though we can in the present case decree only against the land-owners who are before the court, yet that will

60. A decree was made temp. Car. 1. for payment of 40*l.* per ann. out of particular lands, formerly part of the forest of *Bladen*, to the vicar of *C.* in *Wilts* in lieu of tithes. A bill being brought against the land-owners to establish a right to this 40*l.* per ann., it was objected that the land-owners were tenants to the crown of lands lying within the bounds of the forest which formerly paid no tithes, and that the Attorney-General should therefore have been a party. Answered, that it did not appear by the bill that they were lessees under the crown, and the defendants had not insisted upon it in their answers; and so that was out of the case, and the court took no notice of the objection.

will affect the land. The 40*l.* *per annum* ought to be apportioned among the owners, and the original decree may be carried against the occupiers. And decreed a commission should go to ascertain the value of the lands, the owners and occupiers names, and what proportion of the 40*l.* *per annum* each tenant ought to pay. *Ibid.*

61. A creditor or legatee may file a bill against a legatee or debtor if he makes the executor a party and charges collusion.

H. 1720, cor. King, C.
Attorney-General v. Wynne and others, Wynne & Ux v. Humpbrys,
Mof. 128.

Vide 1 Ch. Ca. 277. Nelf. Rep. fo. edit. 303.

62. One having a bastard leaves a personal estate to her executor in trust for the bastard, who dies intestate, and without wife or issue. The executor brings a bill against one who has part of this estate in his hands: he need not make the Attorney-General a party.

H. 1729, cor. King, C.
Jones v. Goodchild, 3 P. Wms. 33.
2 Eq. Abr. 168. pl. 21. 425. pl. 16.
Vide Manning v. Napp, Salk.
37.

63. In a devise of lands to pay debts, if the creditors bring a bill to compel a sale, the heir is generally to be made a party. *Secus* in case of a trust by deed to pay debts.

H. 1730, cor. Jekyll, M. R.
Harris v. Ingledew,
3 P. Wms. 92.

64. *A.*, tenant for years, remainder to *B.* for life, remainder to *C.* in fee; *A.* is doing waste. *B.*, though he cannot bring waste as not having the inheritance, yet he is entitled to an injunction (*a*). But if waste be of a trivial nature, *et à fortiori* if it be meliorating waste as by building on the premises (*b*). The court will not enjoin, nor if the reversioner or remainder-man in fee be not made a party who may possibly approve of the waste.

P. 1730, cor. King, C.
Mollineux v. Powell,
3 P. Wms. 268. (*n.*) to
Bewick v. Whitfield.
(*a*) *Vide Roswell's case, 1 Roll.*
Ab. 377.
(*b*) 1 Inst. 53.
Vide Dayrell v. Champness,
1 Eq. Abr. 400. pl. 4.

65. Bill for tithes by a lay impropiator dismissed, because the owner of other tithes, payable out of the same land, was not a party.

M. 1730, in Scacc.
Hooper v. Letbridge, Bunb. 291.

66. Bill by the surety of an accountant dismissed for want of making the commissioners of excise parties, the accountant being their servant and accountable to them.

M. 1730, in Scacc.
Makepeace & al. v. Needler & al.
Bunb. 291.

67. An old mortgage is made to *B.* for 350*l.*, who, in 1705, makes an under mortgage to *C.* for 300*l.*; *C.* brings a bill to foreclose. *B.* the original mortgagee, or in case of his death, his representatives ought to be made parties to prevent another account as to what was due on the original mortgage, for *B.* had a right to redeem *C.*

M. 1731, cor. King, C.
Hobart v. Abbot, 2 P. Wms. 643.
2 Eq. Abr. 169. pl. 24.

68. A lease of lands is granted, with an exception of mines, &c. and a power of working the same, and a covenant from the lessor to make

1 Feb. 1733, Dom. Proc.
Green v. Poole, Ex. cutrix,
4 Bro. P. C. 122.

satisfaction for all damages and spoil of ground, to arise by working the mines. At the time of granting this lease certain coal mines upon the premises were demised to J. R. In a bill brought for a performance of this covenant against the representatives of the lessor, it is necessary to make the lessee of the coal mines a party.

S. C. But when at the hearing of the cause an objection is taken for want of parties, the court ought not for that reason to dismiss the bill with costs; but should order the cause to stand over, with liberty for the plaintiff, on payment of costs, to amend his bill by adding proper parties.

H. 1734, cor. Talbot, C.
Humphreys, Esq. & Ux v.
Humphreys, Bart.
3 P. Wms. 349.
2 Eq. Abr. 170. pl. 26.
Vide Cleland v. Cleland, Prec.
in Ch. 64. where the taking out
of administration by a wife was dispensed with.

69. In a bill for an account of the personal estate of J. S., though the person who has a right to administer to J. S. be a party, yet this is not sufficient without administration actually taken out.

Vide Brown v. Higden, 1 Atk.
291. *contrâ*.

S. C. Where an executor before probate files a bill, and afterwards proves the will, such subsequent probate makes the bill a good one.

3 P. Wms. 311. (n.)
De Golls v. Ward.
H. 1732, cor. M. R.
Vin. Abr. tit. Creditor and
Bankrupt (K. a), ca. 1.
H. 1734,
Collett and De Golls v. Ward,
Ca. temp. Talb. 65.
2 Eq. Abr. 119. pl. 1, 2.
It was formerly held otherwise
with regard to making the bankrupt a party. 2 Vern. 33.

70. It is a general rule, that no one need be made a party against whom, if brought to a hearing, the plaintiff can have no decree. Thus a residuary legatee need not be made a party, neither in a bill brought by the creditors of a bankrupt against the assignees under the commission need the bankrupt himself be made a party.

T. 1734, cor. Talbot, C.
Wych v. Meal, 3 P. Wms. 310.
2 Eq. Abr. 78. pl. 8.
So the modern practice has
continued. Vide Moodamay v.
Morton, 1 Bro. Ch. Rep. 469.

71. However, on a bill brought for a discovery of some entries and orders of the *East India* Company, the secretary and bookkeeper of the company being made defendants, their demurrer was over-ruled lest there should be a failure of justice.

M. 1724, cor. Talbot, C.
Knight, Widow, v. Knight, Esq.
& al.
3 P. Wms. 331.
2 Eq. Abr. 169. pl. 25.
Vide Duncombe v. Hansley,
3 P. Wms. 333. (n.) and mark
the diversity. In *Knight* v.
Knight the bill was to recover
satisfaction in damages for want
of repairs, for which the personal
estate is the natural fund; but in
Duncombe v. *Hansley* the bill was
not to recover the debt, but only

72. A. covenants for himself and his heirs, that a jointure-house shall remain to the uses in the settlement: the jointress brings a bill against the heir for a performance. Though at law the creditors may sue the heir only where the heir is expressly bound, yet, as the personal estate is the natural fund to pay all debts, and as the executor may make it appear that he has performed the covenant, the executor must be made a party in equity.

to bar the equity of redemption.

S. C.

S. C. A court of equity delights to do complete justice, and not by halves, as to make a decree against the heir, and leave him to prosecute another suit against the executor; wherefore, in order to do such complete justice where both parties are liable to the plaintiff's demand, it requires that both should be made parties.

Vide Cowper v. Clerk, 3 P. Wms. 157. Plunket v. Penlon, 2 Atk. 51.

73. A husband tenant for life, remainder to his wife for life, brings a bill alone for the opinion of the court upon the settlement. Objection for want of making the wife a party allowed; for if the court should decree against the husband the decree would not bind the wife.

8 Feb. 1737, cor. Hardw. C.
Herring v. Yee, 1 Atk. 290.
This cause stood over in order to make the wife a party.

74. A bill in Chancery is never dismissed for want of parties, but stands over upon paying the costs of the day; and a decree of Sir Joseph Jekyll and another, in the court of Exchequer (a), to dismiss on this account, were reversed by the Lords.

M. 1737, cor. Hardw. C.
Anon. 2 Atk. 15.

(a) This appears to be the case of *Green v. Poole*, 4 Bro. P. C. 122.

75. It is not a general rule, that any person who has assets may be made a defendant; but to constitute such a person a necessary party, the plaintiff must shew he either denies he has any assets or applies them improperly.

1 Feb. 1719, cor. Hardw. C.
Simpson v. Vaughan, 2 Atk. 33.

76. In a bill for an account all persons who have possessed themselves of the testator's estate ought to be made defendants.

H. 1740, Canc.
Anon. Barnard. Eq. Rep. 332.
2 Atk. 121.
2 Eq. Abr. 8. pl. 24.

Note; In Eq. Abr. this case is said to be reported by Atkins, *nomine Glasf v. Oxenham*; but that case is somewhat different. There a bill was brought by the representative of testator's widow for 3000*l.* charged on his real and personal estate for her benefit, therefore Lord Hardwicke said, the executor (who testator had appointed *durante minore etate* of his daughter) was a necessary party, for the representative of the whole personal estate, must be before the court, and for want of him the cause stood over. But if the daughter (who was before the court and was of age) has received the personal estate from the executor, the objection for want of parties would have been over-ruled.

77. J. S. by his marriage-settlement reserves to himself a power to dispose of the lands therein mentioned (and which are settled in *strict* settlement) as he should think proper, in case he settled other lands of the value of 100*l.* *per ann.* to the same uses. There is issue of this marriage a daughter. B., without notice of this settlement, articulated with J. S. for the purchase of these lands; but, before the time for completing the payment of the purchase-money, B. had notice of the settlement, and thereupon he refused to pay the residue. J. S. brought his bill in order to compel B. to complete his contract; suggesting, that at the time

H. 1740, cor. Hardwicke, C.
Lamplugh v. Hobden,
Barnard. 371.
2 Eq. Abr. 170. pl. 29.

(a) For in order to have a decree for performance of the contract, it will be incumbent on the plaintiff to make out that he has effectually settled other lands of the value of 100*l. per annum* to the same uses as in the original settlement; now the proof that the plaintiff may make of this might be sufficient to entitle him to such decree in case that the wife and child were not made parties; and yet it might not be sufficient in case that they were; and were they not to be made parties, they might bring a new bill and overturn defendant's title. And notwithstanding they should be brought before the Master, (for it was insisted that it would be sufficient to bring them before the master in order that they might lay before him any objections, to shew that the estate in the second settlement was not of the value of 100*l. per annum*) nothing that is there done will conclude them; and the plaintiff cannot (in this case) make out a good title, unless they are made parties. It is not proper to make persons parties to a bill merely to the end that they may litigate their own title; but here is another end of making the wife and daughters parties. The bill may be amended by praying that they may join in a conveyance to the purchaser, and a decree may be made accordingly, Per Lord Chancellor, in S. C. Barnard. 372.

H. 1740, cor. Hardwicke, C.

Vernon v. Bluckerby,

Barnard. 377, 378, 383, 384.

2 *Atk. 141. 2 Eq. Abr. 170. pl. 30.*

Lord Hardwicke said, he thought the commissioners only, and not the treasurer, should have been made parties, for it is absurd to make a person who acts ministerially the sole party. The cause stood over for want of parties, plaintiff paying the costs of the day.

Canc. *Quare term and year.*

Bottle v. Stanley,

2 *Eq. Abr. 528. pl. 1.*

78. In a bill against the treasurer under the commission relating to the building of the 50 new churches, the commissioners must be parties.

79. If a person is not a party to a suit, nor acquired any right *pendente lite* from any one as party, but is only exercising an antecedent right, inasmuch as he is not a party, this is no breach of an injunction.

Canc. *Quare term and year.*

Sungosa v. East India Company,

2 *Eq. Abr. 170. pl. 28.*

80. To a bill for relief all persons necessary to the relief must be made parties, or defendant may plead to such a bill. *Secus*, where a discovery only is wanted.

H. 1740, cor. Hardwicke, C.

Harrison v. Pryfe, Barnard. 325.

2 *Eq. Abr. 632. pl. 11.*

81. Where a real estate is in the hands of a trustee, and the trustee conveys it over to another who has no notice of the trust, if a bill is brought by the *cestui que trust*, the trustee must be made a defendant.

S. C. Barnard. 324.

2 *Eq. Abr. 632. pl. 12.*

82. J. S. who had been governor in the East Indies, in 1720 purchased 1000*l. South-Sea* stock, and accepted it in the *South-Sea* books a short time after he had bought it. There was likewise another J. S. who at the same time was owner of some *South-Sea* stock, and he was known by the description of J. S. of R. By some means J. S. of R. got the 1000*l. belonging to governor J. S.* placed to his account in the *South-Sea* books, under the description of 1000*l. South-Sea* stock belonging to J. S. of R. In 1725 J. S. of R. transferred this 1000*l. South-Sea* stock to B. his broker, in order to sell it for him, which B. did accordingly. Governor J. S.

J. S. died, and his widow became his representative, and then the fraud being discovered, the widow demanded satisfaction of J. S. of R. which struck him with a great deal of confusion, and he died the day after. The bill was brought by the governor's widow against the administrator of J. S. of R. and likewise against the *South-Sea* company, in order to have a satisfaction for this fraud. On the hearing it was objected, that B. the broker ought to have been made a party. But Lord Chancellor *Hardwicke* was of opinion that there was no occasion for it.

83. A creditor brings a bill under the statute of fraudulent devises (a) against the assignee of the devisee only, the heir at law is a necessary party; and for want of his being before the court the cause was ordered to stand over.

S. C. If an action at law is brought, it must be both against the devisee and heir at law, and equity follows the law in this respect.

84. Plaintiff who was entitled to the equity of redemption in certain lands, brought his bill against the representatives of W. who was the *mesne* purchaser, and likewise against defendant who was the *puisne* purchaser. Plaintiff did not reply to the answers of W.'s representative; and a question arose whether they ought not to be brought before the court as proper parties. *Per cur.*—The representatives of W. deny that W. had any notice of plaintiff's title when he purchased; but it was admitted that defendant had notice when he bought of W. If the cause should go on, defendant would be deprived of the benefit of the defence set up by the representatives of W. (a). Plaintiff's offer to waive an account of the rents and profits in W.'s time might have removed the objection with regard to his representatives, if there had not been another objection, viz. that of depriving defendants of their defence of their denial of notice. Wherefore Lord Chancellor allowed the objection for want of parties in not bringing W.'s representatives before the court.

85. Where a mortgagee assigns without the mortgagors joining the heir of the mortgagor on preferring a bill to redeem has no occasion to bring the original mortgagee before the court, for the assignee, as standing in his place, will be decreed to convey.

17 Feb. 1740, cor. Parker, J.
at the Rolls.
Warren v. Stawell, 2 Atk. 125.
(a) 3 & 4 W. & M. c. 13.

27 Feb. 1740, cor. Hardw. C.
Lewthorpe v. Carlton, 2 Atk. 139.
Barnard. 358.

(a) Lord Hardwicke compared this to cases at law of a tenant by warranty, &c. where one defendant is allowed to pray in aid the evidence of another defendant, who has an interest in the thing contested, if it is of advantage to him in strengthening his own case.

29 April 1740, cor. Hardw. C.
Hill v. Adams, 2 Atk. 39.

31 July 1740, cor. M. R.
Plunkett v. Penjon, 2 *Atk.* 51.

86. A bill, so far as it is not contradicted by the plea, must be taken to be true. A plea, for want of proper parties, is a plea in bar, and goes to the whole bill as well to the discovery as to the relief. A plea that the bill is brought against the representatives of the real estate only, when the representatives of the personal ought to be parties, ought to be allowed though suspected to be put in merely for delay. In bills of discovery all persons must be made parties who necessarily ought to be so; but suits must not be multiplied improperly. At law, if the heir and executor are joined in an action they may demur; but in equity they may be joined. While the representation is contesting in the spiritual court, a bill for a discovery of assets may be brought against the heir without making an administrator a party; and in such case a plea for want of parties would not be allowed.

M. 1740, Canc.
Rudge v. Chapman & al.
 2 *Com. Rep.* 696.
 2 *Eq. Abr.* 170. pl. 27.
S. C. nomine Rudge v. Hopkins.
 Bill to establish a custom, the owner of the inheritance must be a party. *Bunb.* 181. Bill for tithes by the Bishop of London and *B.* as sequestrator during the incapacity of the incumbent, dismissed for want of making the incumbent a party, either in person or by his committee. *Bunb.* 141.

87. If a bill is brought to establish a general modus through a whole parish, all the land-owners must be either plaintiffs or defendants; but if the person sues for tithes in kind, defendant may insist upon such a modus, though the rest of the parishioners are not made parties.

14 April 1741, cor. Hardw. C.
Ex parte Angel, 2 *Atk.* 162.
Barnard. 423.

88. There were seventeen persons who undertook to collect the money arising from the briefs issued, pursuant to an act passed in 4 *Ann. c.* 13. on behalf of the sufferers by the great fire at *Blandford* in 1731, and one *S.* was appointed their agent. The undertakers received large sums of money, part of which was duly distributed by their agent, but they never returned all the briefs into the court of Chancery, as directed by the act. Seven of these undertakers died, and then a petition was presented on behalf of the sufferers for an account, &c. It was contended, that the representatives of the deceased undertakers should be brought before the court. *Sed per cur.*—It is not necessary; the survivors must account; the undertakers are to be considered as one body, and they are all answerable the one for the other, therefore the objection is immaterial.

14 Dec. 1741, cor. Hardw. C.
Brace v. Hamilton, 2 *Atk.* 235.

89. It is not always necessary where the equitable interest is assigned, to make the person who has the legal interest a party; but if an obligee has assigned a bond, and a presumption of

its

its being satisfied arises from the great length of time, as in the present case, where a bond was given by J. H.'s father in 1709, which was assigned in 1717, and no demand made for twenty-two years, the cause must stand over to make the representative of the obligee a party, because it is possible the obligee may have been paid, and therefore it is necessary to ascertain that fact by answer.

90. Bill to redeem a mortgage of long standing. The mortgagee had made an absolute conveyance of the estate, (without any clause of redemption,) with several limitations, and remainders over. Objected, the persons in remainder ought to have been parties. *Per cur.*—Where a mortgagee who has a plain redeemable interest makes several conveyances upon trust, in order to entangle the affair and render it difficult for a mortgagor or his representatives to redeem, it is not necessary the plaintiff should trace out all the persons interested in order to make them parties: but where the redemption depends upon equitable circumstances, and plaintiff is not in the common case of redemption, and where the mortgagee in fee has made an absolute conveyance, with several limitations and remainders over, the decree cannot be complete without bringing at least the first tenant in tail before the court.

17 Dec. 1741, cor. Hardw. C.
Tates v. Hambly, 2 Atk. 237.

91. Bill by a lessee under a church lease against a lord of a manor and a particular tenant, that the tenant may pull down his house, which obstructed the plaintiff's right of way. Objected, that the owners of the inheritance were not parties. *Per cur.*—If the question had concerned a right of common, the right could not be established without bringing the owner of the inheritance before the court. So upon a bill by a lessee for tithes, or for establishing a *modus*. Such is the practice in *Scaccario*, and the general rule is, where the jurisdiction is drawn out of a court of law, all parties must be before the court who can be necessary to make the determination complete, and to quiet a right. Upon the whole, this objection is good.

12 Feb. 1742, cor. Hardw. C.
Poore v. Clark, 2 Atk. 515.

As to freeholders and lessees of a manor, if they do not think proper to dispute the plaintiff's right, he is not obliged to bring them before the court; but if they should not submit to the right the plaintiff claims, a decree against the lord will not bind copyholders in fee or freeholders for life, but

they may controvert the right notwithstanding the decree.

22 Feb. 1742, cor. Hardw. C.
Darwent v. Walton, 2 Atk. 510.

92. Bill against one partner for a joint demand, the other being abroad. *Per cur.*—An exception for want of parties in this case, is in nature of a plea in abatement at law. At law, after proceeding on the merits, the matter can never be taken up again; but in equity, a demurrer will lie for want of parties, or exceptions may be taken at the hearing.

P. 1742, Cane.
Pawlet v. Bishop of Lincoln,
2 Atk. 296.

93. Plaintiff may at the hearing of a cause waive the relief he prays against a particular person, and then an objection that that person is not a party will have no weight.

S. C. In an action at law for fees, no person need be a party but he who has received the fees. *Aliter* in equity, where if a bill is brought for an account of fees, and to establish a right, all persons who pretend to a right must be before the court, for they will be bound by a decree; but at law a judgment recovered for fees will not bind the right of a third person.

P. 1742, cor. Hardwicke, C.
Williams v. Williams,
9 Mod. 299.

94. *A.* gave his real estate to *B.*, and his personal to *B.* and *C.* his executors, who proved the will and acted. *B.* died, and a bill was brought for a legacy charged upon the real and personal estate. *Per cur.*—It is not sufficient to make the surviving executor and *B.*'s heir at law parties, but *B.*'s executor likewise, because *B.*'s heir is interested in the discovery of the personal estate, since that is to be first applied: and it seems to be a rule, that *where a defendant is interested in the having another made a defendant, the plaintiff must make such a defendant: but where the plaintiff only is affected, he may or may not make such party a defendant, at his pleasure.*

16 July 1744, cor. Hardw. C.
Jones v. Jones, 3 Atk. 111.

95. An objection for want of parties should be made at the opening, before the merits of the case are disclosed; though the court is frequently compelled (as in the present case) to let the cause stand over for want of parties, even after it has been thoroughly heard.

11 Dec. 1744, cor. Hardw. C.
Attorney General v. Balliol College,
9 Mod. 407.

96. No need to make persons parties to a bill who live out of the jurisdiction of the court; and a decree will not be void against such persons, though

though they are not made parties: it is usual, however, in such cases to reserve liberty to apply for further directions, that persons out of the jurisdiction may not be quite concluded; but may have liberty to apply for alterations in the decree by petition.

97. There were three obligors in a bond. The obligee brought the principal, and the representative of one of the sureties before the court, stating by his bill, that the third obligor was dead insolvent, wherefore he did not make his representative a party. On the circumstances of this case an objection for want of parties was over-ruled.

4 Feb. 1746, cor. Hardw. C.
Madox v. Jackson, 3 Atk. 406.

Where a debt is joint and several, the plaintiff must bring each of the debtors before the court, because they are entitled to the assistance of each other in taking the account; besides, debtors are entitled to a contribution where one pays more than his share.

So, if there are different funds, as where the debt is by specialty, and the plaintiff may sue either the heir or executor, both must be made parties.

But there are exceptions to these rules, as where some of the obligors are only sureties, there is no pretence for the principal to say a surety shall be brought before the court, unless he had paid the debt. So where there are no personal assets, and that fact plainly appears in the cause, it is not necessary to bring the representative of the insolvent co-obligor before the court.

98. Bill by an assignee of a bankrupt against defendants, for an account of monies charged to have been received by them of the bankrupt since his bankruptcy. Some of the defendants being only agents, the cause stood over in order to make the principals parties. The plaintiff's counsel would have gone on against one defendant for a distinct claim, but Lord Hardwicke would not permit it unless plaintiff would dismiss his bill as to those defendants who were improperly brought before the court.

6 Dec. 1746, cor. Hardw. C.
Wicks v. Marshall & al.
3 Atk. 400.

99. Bill for an account, and for the delivery of a strong box which was in the custody of the defendant, and in which were found jewels and a note in these words, "*Jewels belonging to the Duke of Devonshire in the hands of Mr. Saville*," whose representative the plaintiff was, and in whose possession

21 June 1748, cor. Hardw. C.
Saville v. Tunkred, 1 Ves. 101.

Lord Hardwicke said, a pawnee of a pledge, as Saville was, may bring trover or detinue for it without troubling himself with the pawner, for he has a special property. But supposing he was not

pawnee, and had only possession of the jewels, and had delivered them to another, that person has nothing to do with the Duke. Therefore let the jewels come into Saville's hands which way they might, he may give the custody of them to any one, and have them back without hurting the Duke or his representative.

session they had been from 1695 to 1745. An objection was made, that the Duke's representative should have been made a party to see if he claimed them, because it was said expressly that they were his, and nothing said of an assignment to Saville. Objection over-ruled.

3 July 1748, cor. Hardw. C.
Newland v. Champion,
1 Ves. 105.

100. A creditor may make other persons parties to a suit, besides the personal representatives of the testator, for other persons may have possessed themselves of the specific assets.

28 Oct. 1748, cor. Hardw. C.
Peacock v. Monk, 1 Ves. 131.

101. It is not necessary to make more than the executor party to a suit, for he sustains the person of testator to defend the estate for him, the creditors and legatees.

29 June 1751, cor. M. R. abf. C.
Leigh v. Thomas, 2 Ves. 312.

102. Bill for an account of prize-money, and to have two shares paid to plaintiffs as agents, according to the general articles under which the cruise was set on foot, and which gave the crew liberty to appoint two agents, though there was no provision in the articles for the appropriation of shares to such agents as might be appointed. Plaintiffs were appointed by subsequent articles, signed by sixty-four of the crew (the whole number being eighty). The present bill was brought by plaintiffs on behalf of themselves and the said sixty-four, but not of the whole crew. Demurrer for not making the whole crew parties. *Per* Master of the Rolls—It is impossible to take the account without bringing the whole crew before the court. Plaintiffs claim a particular right which they cannot maintain against the proprietors in general; nor can they have a decree without the other persons who have a right to litigate the question. Demurrer allowed.

24 Oct. 1752, cor. Hardw. C.
Finch v. Finch, 2 Ves. 492, 3.

103. Upon a bill to execute a trust, the first person entitled to the remainder and inheritance of the estate must be a party if *in esse*, and if there be none in being, the trust must not remain unexecuted until a son be born, but the court must take facts as they stand, and the decree will be good; for unless an after-born son can shew fraud or collusion, he will be bound by it.

5 Dec. 1769, cor. Camden, C.
Reynoldson v. Perkins, Amb. 564.
1 Eg. Abr. 74.

104. In a bill of foreclosure it is sufficient to make the first tenant in tail a party, for he sustains the interest of every body, and those in remainder are considered as cyphers.

105. If the commissioners of a navigation enter into an agreement with an engineer, all the acting commissioners are personally liable; and it seems sufficient to make them only parties, without bringing all the subscribers before the court.

Vide Poucher v. Paulin, 9 Geo. 2. cited, where an action against the surveyor of a turnpike was brought by a person who he had employed, and held it would not lie, but must be against the commissioners; *et vide Melchart v. Halfey*, 3 Will. 149. where in an action by the Paviours of Hanover-square against the Commissioner's Clerk, *cur. C.*, B. gave a rule to inspect the commissioner's books, in order to discover their names, and that they might be made parties.

106. Where the personal representative is a mere formal party, the cause will go on, though he be not before the court, and he may afterwards be brought before the Master if a decree be made.

T. 1779, *cor. M. R.*
Fletcher v. Alburner,
1 Bro. Ch. Ca. 498.
1 Eq. Abr. 74.

107. The committee of a voluntary society entering into agreements with tradesmen, on behalf of the whole society. It is sufficient to make them parties to a bill, and not necessary to include all the subscribers.

Vide Horsley v. Bell, Amb. 770. and 1 Bro. Ch. Ca. 101. (n.)

T. 1781, *cor. Thurlow, C.*
Gullen v. Duke of Queensberry & al.
1 Bro. Ch. Ca. 101.
1 Eq. Abr. 24. 74.
Affirmed in Dom. Proc. 23
March 1787.

108. Bill by the creditors of *A.* against his executor. Lord Commissioner *Loughborough* thought the residuary legatee ought to be a party, being interested in resisting the demands, otherwise the whole residue might be exhausted by collusion. But Mr. *Ambler* and Mr. *Maddocks* (*curiæ amici*) said, the practice was not to make the residuary legatee a party; and Mr. *Graham* said, it was unnecessary even where the bill was by a legatee (*a*). Lord *Loughborough* observed, if it was so, it was an anomalous case in equity where all parties interested are to be before the court. Decreed as prayed.

T. 1783, *cor. Lds. Comrs.*
Lawson v. Barker,
1 Bro. Ch. Ca. 303.

(a) *Vide Anon.* 1 Vern. 267.
and 1 Eq. Abr. 73. pl. 13. *Love*
v. Jacob, H. 1776.

109. A share in *Covent-Garden* theatre having been mortgaged, the mortgagee assigned the mortgage in trust for three persons, who had contributed equally. One of them filed a bill to foreclose. *Per cur.*—One of the assignees only cannot foreclose without making the other two parties, for they are joint-tenants.

P. 1784, *cor. Thurlow, C.*
Love v. Morgan,
1 Bro. Ch. Ca. 368.
1 Eq. Abr. 74.

Note: The ordinary decree of foreclosure was first pronounced in this case; but the registrar finding difficulty in drawing up the order, applied to the Lord Chancellor, who said this was a new

case in regard the assignees were joint-tenants; and the cause over, in order to make the other two parties.

110. In a bill against a trustee, where he has assigned his trust, the assignee should be made a party, as the decree should be first against him, and then the trustee should stand as a security for having (in this case) broken his trust.

T. 1787, *cor. Thurlow, C.*
Burt v. Dennett,
2 Bro. Ch. Ca. 225.
1 Eq. Abr. 74.

M. 1787, cor. Thurlow, C.
Fill v. Brown,
 2 Bro. Ch. Ca. 276.
 1 Eq. Abr. 74.

Note; Lord Chancellor said, the real representative must be before the court, though it is not necessary to have the personal representative. *Vide* *Duncombe v. Hansley*, 3 P. Wms. 333. (n.)

P. 1788, cor. M. R. abf. C.
Moffat v. Farquharson,
 2 Bro. Ch. Ca. 338.
 1 Eq. Abr. 74.

Note; His Honor distinguished this from the case of part of the parishioners filing a bill on behalf of themselves and the rest of the parish to establish a *modus*.

H. 1789, cor. Thurlow, C.
Attorney-General v. Green and University College, Oxon.
 2 Bro. Ch. Ca. 495.
 1 Eq. Abr. 74.

M. 1789, cor. Thurlow, C.
Ray v. Fenwick,
 3 Bro. Ch. Ca. 25.

111. In a bill by a second mortgagee, to redeem the first mortgage, the mortgagor, or his heir, must be a party: the heir being abroad, the court could not proceed, but being shortly expected in England, Lord Chancellor ordered the cause to stand over.

112. One part-owner of a ship cannot bring a bill on behalf of himself and the other part-owners, but they must all be parties.

113. In an information to apply money given to a charity, to other uses than those specified by the will; where there is a residuary gift to trustees for other charitable uses, the trustees and the heir, though disinterested, must be parties.

114. Defendant gave a bond to J. S., who assigned it to plaintiff, and died without a representative. Motion on the part of plaintiff for a *ne exeat regno* against defendant on the usual affidavit, and in order to give plaintiff time to administer to J. S. Lord Chancellor refused the writ, because the suit without a representative of the original obligee *must be dismissed (a) for want of parties*.

(a) Though this is not a case of actual dismissal for want of parties, the Lord Chancellor's suggestion seems dissimilar from the present practice. In *Stafford v. City of London*, 1 P. Wms. 428. Lord Parker said, where a bill wanted proper parties it was discretionary in the court either to dismiss the bill without prejudice to another bill, or allow an amendment on payment of costs; but in *Anon.* 2 Atk. 15. Lord Hardwicke said a bill was not dismissible for want of parties. A decree of Sir Joseph Jekyll's to dismiss a cause at the Rolls for want of parties was reversed, and a decree of the same nature in the Exchequer (1) was likewise reversed in the Lords; and in *Jones v. Jones*, 3 Atk. 111. Lord Hardwicke said, that though the rule was to make the objection for want of parties at the hearing, yet the court had been frequently compelled to let a cause stand over for want of parties after it had been thoroughly heard, as in that case where though the objection was made very late Lord Hardwicke said, it must have its weight, otherwise he should be obliged to dismiss the bill, which was never done lately, though it was attempted by Sir Joseph Jekyll formerly, but reversed on appeal to Lord King; and since that time, said Lord Hardwicke, causes are ordered to stand over on paying the costs of the day, that the plaintiff may have an opportunity of making proper parties.

(1) This appears to be the case of *Green v. Poole*, 4 Bro. P. C. 122.

H. 1791, cor. M. R.
Collett v. Wollaston,
 3 Bro. Ch. Ca. 228.

115. An insolvent debtor is not a necessary party to a bill by a purchaser of his interest in stock against his assignee.

H. 1791, cor. M. R.
Skerrit v. Birch,
 3 Bro. Ch. Ca. 229.

The cause stood over to make the proper parties on paying the costs of the day.

116. Bill for a moiety of a residue, the other moiety was given to A. for life, and upon her decease, to such persons as she should appoint; in default of appointment, to certain other persons; those other persons must be made parties, though upon such a remote contingency.

117. A husband is no more than a formal party to bill against a wife in respect of her separate estate. 5 March 1791, cor. Thurlow, C. *Lillie v. Airey*, 1 Ves. jun. 278.

118. A residuary legatee must be a party to a bill for a *specific* legacy, for the executors must be delivered: it would be unjust to leave them open. 17 May 1791, cor. Thurlow, C. *Wainwright v. Waterman*, 1 Ves. jun. 313.

119. Bill by some of the residuary devisees on behalf of themselves and the other devisees. *Per cur.*—All the devisees must be parties. M. 1791, cor. Thurlow, C. *Parsons v. Neville*, 3 Bro. Ch. Ca. 365.

120. *A.* and *B.* were merchants and partners in *America*, and *C.* was a merchant in *England*. *A.* came over with a cargo the joint property of *A.*, *B.*, and *C.* *A.* and *B.* were indebted to *D.* who on *A.*'s arrival pressed him for a debt. *A.* gave him some tobacco to sell on account, and *E.* was appointed as factor to dispose of it, which he did, but refused to account to *D.* alledging that the partnership of *A.* and *B.* was indebted to him also; whereupon *D.* brought his bill against *C.* and *A.* for a discovery and account, charging also that *B.* was out of the kingdom, which was proved by his partner *A.* whom plaintiff examined as a witness. It was objected by defendants' council that persons were wanting who ought to be made parties before an account could be directed, viz. *C.* the joint owner of the cargo, and *B.* the partner of *A.*; and as to *A.* it was contended that he was improperly made a party; and that being examined as a witness he ought to have his costs. *Per cur.*—*C.* is not a necessary party to this bill, *E.* the factor having admitted the produce of the tobacco to be in his possession, and that he had kept distinct accounts. As to *B.* it was sufficiently proved that he was out of the jurisdiction, and defendant is precluded from objecting that he was not a party. Decreed the produce of the tobacco to the plaintiff, and that *A.* should have his costs. H. 1792, cor. Buller, J. abf. C. *Weymouth v. Bowyer*, 1 Ves. jun. 417.

121. To a bill by an assignee of a judgment, the assignor is a necessary party; for the assignee has only an equitable title. 2 May 1792, cor. Thurlow, C. *Garbutt v. Lewis*, 1 Ves. jun. 463.

122. A trustee in a will who released and never acted ought not to be a party in a suit to set aside the will on the ground of fraud, and therefore need not answer as to the charges of fraud in which he is not personally implicated. T. 1792, in Scacc. *Richardson v. Hulbert and another*, 1 Anst. 65.

123. Where

T. 1792, cor. Lds. Comrs.
Chitty v. Parker,
4 Bro. Ch. Ca. 38.

123. Where a legacy is given to a charity, it is not necessary to make the Attorney-General a party to a bill for an account, &c.

T. 1794, in Scacc.
Griffin v. Archer & al.
2 Anst. 478.

124. In a suit against assignees, the bankrupt may be examined as a witness, and therefore ought not to be joined as a party, and harassed by a suit in which he has no interest.

M. 1795, in Scacc.
Blake v. Jones, 3 Anst. 651.

125. One of two joint executors and residuary legatees assigned his interest and died: the assignee filed a bill to have half the residue transferred to him. The representative of the assignor need not be a party unless there appear any doubt of the validity of the assignment.

15 Mar. 1796, cor. Loughb. C.
Franco v. Franco, 3 Ves. jun. 75.

126. Bill by one trustee of stock against the other to compel him to replace it or give security according to his engagement entered into when the plaintiff joined in transferring the stock into his name: demurrer, for that the *cestui que trusts* were not parties, over-ruled with costs, it appearing the demurrer was only put in for delay, and to cover a breach of trust.

27 July 1796, cor. Loughb. C.
Whelman v. Dubeffs of Rutland,
3 Ves. jun. 233-4.

127. Bill by devisees in trust to sell, for a specific performance of an agreement to purchase: exceptions were taken to the report in favour of the title, that the persons entitled to the purchase-money (subject to debts, legacies, and other charges) were not parties. Lord Chancellor was of opinion they ought not to be parties to the conveyance; and if they were, their covenant ought to extend only to their own acts and those of the devisor, not to a general warranty, without a special contract for it: but as the point must come properly upon objections to the conveyance, the exception was over-ruled upon the form.

S. C. Bill by devisees in trust to sell for specific performance of an agreement to purchase; that the heir of the devisor is not a party to the suit is not matter of exception to the report in favour of the title.

T. 1796, in Scacc.
Faithful v. Hunt, 3 Anst. 751.

128. In a devise to sell and the produce to be divided, all the persons interested in the fund must be parties, although the land is sold before the suit.

T. 1796, in Scacc.
Starr v. Trinity College, Cambridge,
3 Anst. 768.

129. In a bill to establish a contributory *modus*, all the persons liable to the contribution need not be made parties.

S. C.

S. C. In a bill to establish a *modus* where the rectory is an eleemosynary foundation, of which the king is visitor, the Attorney-General need not be made a party.

130. The court ordered a bill of foreclosure to stand over to make a judgment creditor (who was the only incumbrancer not before the court) a party; but would not lay it down as a general rule that all incumbrancers in all cases must be parties, lest it should arm mankind with a shield to ward off a foreclosure,

H. 1797, cor. M. R.
Bishop of Winchester v. Beaver,
3 *Ves. jun.* 314.

Sec. 2. In what Cases the Complainant's Remedy is properly at Law, and his Bill in Equity is consequently dismissible.

1. **THE** husband's executors being sued at law for goods bought by the wife whilst she lived separate from him and had a separate maintenance (which was known to the tradesmen, who trusted her). Upon a bill by the executors for an injunction, it was denied, they having a very good defence at law.

M. 1682, Canc.
Ferrars v. Ferrars, 1 Vern. 71.
1 *Eq. Abr.* 61. pl. 3.
Vide Scott v. Manley,
1 *Sid.* 109.

2. Defendants complaining that they could not have a fair trial in the county where an action was laid against them, brought their bill to change the venue, which was dismissed (a).

M. 1684, cor. North, C. S.
New Elm Hospital v. Andover
Corporation, 1 Vern. 267.

(a) It does not appear why this bill was dismissed; but probably the court thought the remedy was properly at law.

In Sir William Tyrringham's case (1) the venue was changed upon a bill brought purely for that purpose, Sir William being so powerful in the county of Bucks that right could not be had against him there; but it was on condition that if plaintiff had a verdict he was to have no costs.

(1) Cited in *Earl of Winchelsea v. Norcliffe, 1 Vern. 439.*

3. A feme covert heir at law and her husband (not consuant of their right) being drawn in to execute articles for supplying the defect of a surrender of copyhold lands to the use of a will whereby they were devised to the plaintiff. Master of the Rolls would not decree the articles of a feme covert for conveying her inheritance to be carried into execution; but dismissed the bill, and left the plaintiff to his remedy at law: and on appeal Lord Somers affirmed the decree, upon the ground of the fraud, without regarding the inheritance of the wife.

T. 1697, cor. Somers, C. S.
Preson & Ux. v. Wasley & Ux.
Proc. in Ch. 76.
2 *Eq. Abr.* 55. pl. 1.
Vide Young v. Clerk, Proc. in
Ch. 538. *Hicks v. Phillips,*
Proc. in Ch. 575. *Seagood v.*
Meale, Proc. in Ch. 560. *Savage*
v. Taylor, Ca. temp. Talb. 234.
236. *Wooley v. Bryan, 2 Bro.*
P. C. 387. 4 *Vin. Abr.* 57. pl. 19.
Carol v. Chamberlain, 14 July
1721. Gro. & Rud. of Law &
Eq. 19. ca. 8, 9. *Toppe v. Stan-*
hope, 2 Bro. P. C. 183. 2 *Vin.*
Abr. 533. pl. 32. *Cole v. Gib-*
bons, 3 P. Wms. 290.

M. 1703, Canc.
Dandy v. Turner,
1 Eq. Abr. 372. pl. 7.

4. A part-owner of a ship borrowed money of plaintiff upon a bottomry-bond, payable on the return of the ship from the *East Indies*. The *East India Company* broke up the ship in the *East Indies*, and the owners brought their action and recovered damages against the Company, but not a full satisfaction. The obligee brought his bill to have a proportion of his satisfaction recovered; but his bill was dismissed, and he was left to recover at law, for equity will never assist a bond that carries an unreasonable interest.

P. 1708, cor. Cowper, C.
Wallis v. Everard,
3 Ch. Rep. 161.

5. Plaintiff, as administratrix to her husband, brought her bill against his heir at law for several demands, *et inter alia*, for her dower. Dismissed; the remedy being at law.

P. 1714, cor. Parker, C.
Hilton v. Lord Scarborough & al.
2 Eq. Abr. 171. pl. 2.
4 Vin. 425. pl. 13.

6. A bill to be quieted in the possession of an ancient ferry used with a rope over the river *Ware*, was brought against 20 defendants, (who had cut the rope,) to avoid the multiplicity of actions. *Per Parker, C.*—Plaintiff may have trespass for cutting the rope. A ferry is in nature of a highway; and a bill does not lie to be quieted in possession of a highway. A bill lies to be quieted in possession of a common; but that is of a different nature: this is a navigable river, and the rope to the ferry is an obstruction to the navigation. If plaintiff has any such right, there is a proper remedy at law. Bill dismissed with costs.

M. 1717, in Scacc.
Dr. Sloane v. Heathfield,
Bunb. 18.

7. A bill lies for discovery of treasure trove; but the plaintiff cannot have relief upon it; for he might bring his action of trover. Bill dismissed with costs.

P. 1718, cor. Jekyll, M. R.
Tichburn v. Leigh,
2 Eq. Abr. 160. pl. 4.
6 Vin. Abr. 365. pl. 14.

8. Bill to set aside leases made pursuant to a power dismissed, because a matter purely determinable at law, *i. e.* whether the power was well executed or not. And *per Jekyll, M. R.*—If a bill is brought for a matter properly determinable at law, though the legal estate is vested in trustees, the *cestui que trust* ought first to apply to the trustees, to make use of their names at law before he brings a bill in equity; for a bill in such a case is only necessary where the trustees refuse their names to be made use of in an action to determine the right.

P. 1719, in Scacc.
Disney & al. v. Robertson & al.
Bunb. 41.

9. Bill for tolls for landing goods in plaintiff's manor dismissed; his remedy being at law.

Sic in Bond v. City of Exeter, H. 1718. *Harding v. Ainge*, 26 June 1719.

§ 2. *Dismissed, Remedy at Law.*

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10. Bill for establishing a right to tolls for carts, &c. coming into a manor, dismissed; it not appearing that the place where the toll-bars were erected was within the manor.

M. 1720, in Scacc.
Attorney-General v. Ayre & al.
Bunb. 68.

11. Bill for beaconage, (or lights for the benefit of navigation,) dismissed; plaintiff's remedy being at law.

H. 1721, in Scacc.
Mayer of Boston v. Jackson & al.
Bunb. 101.

Vide Disney v. Robertson,
City of Exeter v. Bond, H. 1718.

12. Bill for a discovery and account of the quantity of coals dug under the plaintiff's glebe, and for satisfaction and an injunction to stay the works. The court thought the plaintiff's remedy was at law; but retained the bill till the plaintiff had ascertained his title at law.

M. 1721, in Scacc.
Taylor v. Crompton & al.
Bunb. 95.
Vide 1 Lev. 107. Hard. 1824
1 Vern. 130.

13. Bill for a specific performance of a contract for 1000*l.* *York Buildings* stock, at 105*l.* per cent., dismissed; for that this court will not carry these sorts of contracts into execution, but leave the parties to their remedy at law for the difference; but no costs; because the defendant's answer was falsified in several particulars.

T. 1722, cor. Macclesfield, C.
Dorison v. Westbrooke,
5 Vin. Abr. 540. pl. 22.
2 Eq. Abr. 161. pl. 8.

14. *J. S.* agreed to sell a wood upon his estate to *W.* and gave him a certain time for cutting and carrying it away. The purchaser being interrupted by persons who pretended a title to the estate after the death of *J. S.* who they insisted was only tenant for life, and therefore had no power to sell, brought his bill for a performance of this agreement. The court upon the hearing were of opinion, that this was only a colourable agreement, set up in order to try the defendant's title in equity, which was properly triable at law; and therefore dismissed the bill with costs. But on an appeal the decree was reversed, and an issue directed to try the title.

5 May 1725, Dom. Proc.
Stone v. Earl of Anglesey & al.
3 Bro. P. C. 101.

15. *P. W.* made her will in 1723, which was destroyed in her lifetime, and she died intestate. Plaintiff insisted it was destroyed by defendant, and defendant that it was done by testatrix. This matter was litigated in the spiritual court; and administration was granted to defendant as next of kin. Bill to set up the will; for that the spiritual court had no jurisdiction of a will destroyed in testatrix's lifetime. Lord Chancellor insisted that the spiritual court had jurisdiction; and if the will was destroyed by defendant, plaintiff had his remedy by action.

7 Aug. 1725, cor. King, C.
Eldred v. Child,
Sel. Ca. in Ch. 49.

Vide Swinb. 263.

H. 1726, Canc.
Powell v. Pellett,
2 Eq. Abr. 209. pl. 3.

(a) Remedies ought to be reciprocal.

T. 1727, in Scacc.
Thornbagb v. Hartstorn,
Bunb. 237.

T. 1727, in Scacc.
Sweetapple v. Duke of Kingston,
Bunb. 238.
Vide Chamberlain v. Spencer
& al. 4 Nov. 1731.

T. 1727, in Scacc.
Tbunkettle & Ox. v. Howorth,
Bunb. 241.

M. 1727, in Scacc.
Torrent v. Burley, 2 Sir. 715.
Note; The dismissal was generally with costs, though the defendant had not demurred to the relief, but run into a proof of the right.

P. 1729, in Scacc.
Reignolds v. Hind,
Eunb. 264.

1 Feb. 1730, Dom. Proc.
Gbettoff & al. v. London Assurance
Comp. 3 Bro. P. C. 525.

16. Defendant agreed by his note under hand to pay B. 200*l.* within two years, and give him a reck of wheat, on condition he married his daughter and settled lands of the value of 600*l.* upon her for her jointure. The marriage took effect, and there was issue a daughter; but both mother and daughter died before the two years expired. Plaintiff insisted it was an agreement proper for a court of equity to execute; and that he had married the defendant's daughter, and had been looking out for several purchases to lay out the 600*l.* and was only prevented by the act of God. Defendant insisted it was a condition precedent, and to be wholly performed at all events before plaintiff could be entitled to the 200*l.*; and if any damages, he might have his action at law; that the plaintiff was not bound to lay out the 600*l.*, and therefore there were no *mutual remedies* (a). The court dismissed the bill, but without costs; for it was in plaintiff's power to have entitled himself to the 200*l.* when he pleased, by laying out the 600*l.*, which not being done, he is not entitled to any relief.

17. Bill for suit of court to a manor and fee-farm rent, or law-day silver, at plaintiff's court-leet, dismissed as proper at law.

18. Bill for tithes, glebe, and right of common. It appearing that the two latter points were proper at law, the court retained the bill till plaintiff had by action ascertained his title; and in the mean time would not decree the tithes.

19. Bill to carry a voluntary deed into execution, retained until the plaintiff had tried his remedy at law, where the court said his remedy was plain.

20. Bill to discover whether defendant's husband died worth 40*l.*, so as to be liable to pay plaintiff a mortuary; and praying relief. Defendant by answer admitted assets, but denied the custom; and at the hearing the bill was dismissed with costs as *to relief*; because that was properly at law, or in the spiritual court: and in a bill against one person the right could not be established.

21. Bill to have the benefit and enjoyment of a water-course dismissed, as being proper at law.

22. To a bill brought to recover a sum of money upon a policy of insurance, the defendants demur-

red

red, because the plaintiff's remedy was at law. Demurrer allowed.

23. Bill for discovery and relief, suggesting, that the defendant broke into intestate's room, and took away ninety-nine broad pieces, &c., dismissed; the equity being denied, and *the proper remedy being in trover.*

T. 1730, in Scacc.
Kerlake, Administrator, v. Pannal & al. Bunb. 287.
Vide Dr. Sloan v. Heathfield, Bunb. 13.
Vide Countess Plymouth v. Bladon, 2 Vern. 33. *contra.*

24. Bill for an account of toll, and relief demurred to, the demurrer allowed, the remedy being proper at law.

M. 1733, in Scacc.
Nottingham Town v. Wood, Bunb. 331.

25. A bill will not lie to carry an award into execution where the parties to the submission do not acquiesce in it, nor agree afterwards to have it executed; but must be enforced at law. Bill dismissed.

P. 1738, cor. Hardw. C.
Tompson v. Noel & al. 1 Atk. 62.

26. A court of equity will dismiss a bill for the recovery of matters which are properly triable at law.

M. 1740, in Scacc.
Conservators of the Level of the Fens v. Hare. 2 Com. Rep. 694.

27. Where the subject-matters of the suit were much entangled, and of long standing, the court would not direct an account before the Master, but dismissed the bill, leaving the plaintiff to his remedy at law.

13 June 1743, cor. Hardw. C.
Sturt v. Mellish, 2 Atk. 610.
Vide Sharman v. Sharman, 2 Vern. 276.

28. In general the court of Chancery will not entertain a bill for a specific performance of contracts for *chattels*, or which relate to *merchandize*, but leave it to *law*, where the remedy is much more expeditious; but in the present case the agreement not being final, but to be made complete by subsequent acts, a bill to carry it into execution was allowed.

15 July 1746, cor. Hardw. C.
Buxton v. Lister & al. 3 Atk. 383, 385, 386.
Sir Joseph Jekyll in Cud v. Rutter, 1 P. Wms. 570. decreed a specific performance in the case of a chattel; but Lord Parker reversed it, and it has been ever since the constant rule not to retain such a bill.

S. C. The court ought to weigh with great nicety cases of this kind, before they determine the bill proper, where it is a mere *personal chattel*.

S. C. Every agreement of this sort ought to be *certain, fair, and just*, in all its parts, or the court of Chancery will not decree a specific performance.

29. Bill for a share of prize-money, dismissed, the sum being certain, and the remedy entirely at law, not against the defendants, but against the agents who had paid the money wrongfully.

22 Nov. 1748, cor. Hardw. C.
Sir C. Ogle v. Admiral Haddock's Representatives, 1 Vef. 163.

30. A. left money in his banker's hands, and took their shop-notes, which he afterwards lost; but

11 Dec. 1749, cor. Hardw. C.
Walmsley v. Child, 1 Vef. 341.

but they never appeared for payment. Seven years afterwards, *A.* being dead, his widow insisted on payment by the bankers, which they refusing, she filed her bill, without any affidavit of the loss, or offer of an indemnity. Bill dismissed, plaintiff's remedy being only at law, where Lord Chancellor had no doubt but an action could be maintained.

31 July 1751, cor. Hardw. C.
Parry v. Owen, *Ambl.* 109.
1 *Eq. Abr.* 75.

31. Bill by an attorney and solicitor for business done; defendant demurred, plaintiff's remedy being at law, or to this court in a summary way. Demurrer allowed.

19 Feb. 1776, Dom. Proc.
Hutchinson, Provoost of Trinity College, Dublin, v. Gamble, Esq. & al.
7 *Bro. P. C.* 374.

32. To a bill brought for setting aside certain leases, as being improperly made, the defendant pleaded, that the question was properly determinable at law only; and the plea was allowed.

H. 1779, cor. Thurlow, C.
Hoare v. Contencin & al.
1 *Bro. Ch. Ca.* 27.
1 *Eq. Abr.* 79.
Vide Bishop v. Church, 2 *Vef.*
100. 371.

33. Where an original right is merely of legal jurisdiction, the death or bankruptcy of parties will not support a bill in equity. They must pursue their remedy at law. Bill dismissed.

Note; An action at law was brought in the principal case. Verdict for the defendant. Motion for a new trial (on argument) refused. *Vide Dougl.* 356.

P. 1779, cor. Thurlow, C.
Saint Luke v. Saint Leonard,
1 *Bro. Ch. Ca.* 40.
1 *Eq. Abr.* 75.

34. A bill will not lie to have an issue to ascertain the boundaries between two parishes. Bill dismissed.

Lord Chancellor said, if he should entertain this bill he did not know what cases would be peculiar to courts of law. Where the tenants of a manor claim a right by custom, the right of all is ascertained by the trial of one; but here the parishioners have no common right in the boundaries of the parish. It would be to try the boundaries of all the parishes in the kingdom on account of the poor laws. These issues are usually by consent.

H. 1783, cor. Thurlow, C.
Bouverie v. Prentice,
1 *Bro. Ch. Ca.* 200.
1 *Eq. Abr.* 75.

35. A bill in equity does not lie against several tenants of a manor for quit-rents, where the party has a remedy at law. Dismissed with costs.

Vide Collett v. Jacques, 1 *Ch. Ca.* 79. *Davy v. Davy*, 1 *Ch. Ca.* 144. 1 *Roll. Abr.* 375. 378. *Pinch.* 241. 256. *Holder v. Chambury*, 3 *P. Wms.* 256. *Benson v. Baldwyn*, 1 *Atk.* 598.

See *post*, f. 8. Of Bills for a Discovery and Relief.

See *post*, f. 10. Of Bills to establish a Custom, or be quieted in Possession of a Right; and therein of Bills of Peace, and of the Examination of Witnesses in *perpetuam Rei Memoriam*.

See also *post*, tit. Demurrer.

Sec. 3. Of original Bills praying Relief, and where such will lie.

1. A Bill may be brought for solicitor's fees only, if for business done in Chancery; and so it may where the business is done in another court, if it relates to another demand made by the plaintiff in Chancery.

M. 1683, cor. North, C. S.
Lord Ranelagh v. Tburnhill,
1 Vern. 203.
1 Eq. Abr. 75. pl. 2.

2. Defendants complaining they could not have a fair trial in the county where an action against them was laid, brought their bill to change the venue. Dismissed.

M. 1684, cor. North, C. S.
New Elm Hospital v. Andover Corporation,
1 Vern. 267.

But in *Sir William Tyrringham's* case, cited in this case, a bill was brought purely to change the venue; complaining that *Sir William* was so powerful in the county of *Bucks* that right could not be had against him there. *Per cur.*—If *Sir William* will not consent to a trial in the county of *Salop*, the court will decree it, but with this, that if the plaintiff has a verdict it shall be without costs, and if against him he shall pay costs.

Sir William Tyrringham's case,
cited in *Earl of Winchelsea v. Norcliffe*, 1 Vern. 439.

3. A bill in equity lies to reverse letters patent obtained by fraud.

M. 1684, Canc.
Attorney-General v. Vernon & al.
1 Vern. 277. 1 Eq. Abr. 75. pl. 1.

4. A bill in equity will not lie to compel a lord of a manor to permit the plaintiff to bring a plaint in the Lords' court in nature of a writ of error to reverse an erroneous common recovery suffered there.

H. 1685, cor. Jeffries, C.
Ashe v. Ragle & al.
1 Vern. 367.

Lord Chancellor said, if there had been any error in an adversary proceeding in the Lords' court, equity would have interfered, but not in this case.

5. A bill in equity lies for recovery of ancient quit-rents, though very small, as 2 s. or 3 s. per annum, and if proved to be constantly paid, the court will decree payment, or will direct an issue to try whether any and what rent is issuing out of all or any of the lands mentioned in the bill.

H. 1685, cor. M. R.
Cox v. Foley, 1 Vern. 359.
Vide Sir William Beverham's case, where a decree was had for a rent of 15 d. per ann.

6. An executor being desirous to apply the assets of the testator, as far as they would go, in satisfying the testator's debts, brought a bill against all the creditors, that they might if they pleased contest each other's debts, and that their preference might be settled. Defendant being a creditor demurred, for that the bill contained a multiplicity of matter wherein he was not concerned. Demurrer overruled, and held a proper bill, and a safe way for an executor to take.

H. 1688, cor. Jeffries, C.
Buckle v. Atleo, 2 Vern. 37.
1 Eq. Abr. 75. pl. 5. 236. pl. 3.

15 Mar. 1701, Dom. Proc.
Tidcomb v. Cholmley,
Colles's P. C. 166.

7. Though a party improvidently tender an issue at law as to one substantive fact, he may notwithstanding put his case on a different ground by a bill in equity.

16 April 1702, Dom. Proc.
Hamilton and another v. Stephenfen & Us.
Colles's P. C. 209.

8. One party exhibits a bill to be decreed to a matter about which an award had been made, without taking notice of the award, and the other party insists on the award; and then the first party files a supplemental bill, stating and objecting to the award, and the other party exhibits a bill to carry the award into execution. The court decreed upon the matter of right originally insisted upon, and left the matter of the award open to each party to take his legal remedy; but the Lords reversed the decree, and sent back the cause, that both causes might be heard upon the whole matter.

T. 1704, Canc.
Kent v. Bridgman,
2 *Eq. Abr.* 159. pl. 1. 243. pl. 10.
Proc. in Ch. 233. S. C. which says, the defendant in equity demurred to the bill, which was over-ruled; and then defendant answered, insisting on his property, &c.

9. *A.* recovered a judgment against defendant's father, and plaintiff (the sheriff's officer) levied 20 *l.* on goods in the father's possession. Defendant brought trover against plaintiff, pretending the goods were sold to him by a bill of sale, but on evidence the sale was proved fraudulent, whereupon a verdict was given for defendant (at law); but for want of his proving a copy of the judgment, as it was held he ought, the jury for that reason only found for the plaintiff. On a bill brought for relief, defendant (in equity) by his answer insisted on his property under the bill of sale and recovery at law, where the matter was properly triable, and relied on that without going into proofs; but plaintiff in equity fully proved his case, and that the judge altered his directions *only for want of proof of the judgment*, and disproved the answer in some particulars. A perpetual injunction was granted against the judgment, and the defendant to pay costs; for though it was examinable at law, it was so in equity too: and plaintiff having set out the whole matter and proved it to be true, if it were not so, the defendant might have disproved it.

P. 1714, cor. Harcourt, C.
Nicholson v. Masters and others,
2 *Eq. Abr.* 203. pl. 2.
4 *Vin. Abr.* 529. pl. 9.

10. Bill against ninety parishioners by the executrix of one of the churchwardens of *W.*, to be reimbursed the money laid out by the testator as churchwarden, for rebuilding the steeple of the church. Objected, that this matter was proper for the ecclesiastical court only.

But by *Harcourt, C.*—The plaintiff is proper for relief here; and there are many precedents of the like

like nature; one in the time of *Cowper, C.* against the parishioners of *Saint Clement's* for the organ in the church, and many more before; and decreed that the parishioners should reimburse the plaintiff the money laid out by her testator with costs, and the same to be raised by a parish rate.

11. A bill may be brought on behalf of a child *in ventre sa mere*, for an injunction to stay waste.

H. 1715, cor. *Cowper, C.*
Musgrave & al. v. Parry & al.
2 Vern. 711.
Vide Palmerv. Cracroft, 2 Vern. 578.

12. A bill does not lie for an owner of a quit-rent, in order to settle what proportion his quit-rent shall pay to the land-tax; such a bill was dismissed with costs in this case.

M. 1716, cor. *Cowper, C.*
Brockman v. Honeywood,
1 P. Wms. 328.
2 Eq. Abr. 160. pl. 3.

13. Defendant agreed with plaintiff to transfer to him 1000 l. *South-Sea* stock on 20th November at the rate of 104 l. per cent., and gave him a promissory note for so doing, and received two guineas of plaintiff in part of consideration money; but defendant in drawing the note had put in the usual words, "or pay the difference," which plaintiff struck out, and then defendant signed the note. Afterwards, and before the time of delivering the stock, the *South-Sea* stock rose in value, and defendant did not deliver the stock at the day, but a few days after offered to pay the difference, and submitted so to do by his answer, but plaintiff insisted to have the stock actually transferred to him. *Jekyll*, Master of the Rolls, decreed a specific performance of the contract, and that defendant do transfer the stock, and pay the dividends since 20th November; the plaintiff to pay interest for the money to that time, and to have his costs. But on appeal, *Parker, C.* reversed the decree, declaring, that he would always discourage bills of that kind (a); but since the defendant did shuffle with plaintiff, and not offer to pay him the difference till two months after the day, he would not dismiss the bill; but directed the Master to inquire what the difference was at the day, and defendant to pay it with interest, but no costs.

M. 1719, cor. *Parker, C.*
Cuddee v. Rutter,
5 Vin. 538. pl. 21.
2 Eq. Abr. 160. pl. 7.
2 P. Wms. 570. and
2 Eq. Abr. 18. pl. 8. nomine
Cud v. Rutter.
Vide Prec. in Ch. 534. S. C.
cited nomine *Scould v. Butter*.

(a) So *Cappur v. Harris*,
Bunb. 135. but cases of this kind depend so much on their own particular circumstances, that it seems no general rule can be laid down. *Vide Colt v. Netterville*, 2 P. Wms. 304. *Thompson v. Harcourt*, 2 Bro. P. C. 415. and *Buxton v. Lister*, 3 Atk. 383. where Lord Hardwicke said, that since Lord Parker's reversal of his Honor's decree in *Cud v. Rutter*, it has been the constant rule not to entertain a bill for a specific performance in case of a chattel.

14. In a case of a bargain for corn, to be delivered on a day certain at such a market, at a certain price, and the corn is not delivered according to contract, the buyer shall not by a bill in equity compel the seller to a specific performance of this agreement, but he shall be left to his remedy at

T. 1720, cor. *Parker, C.*
Cuddee v. Rutter,
5 Vin. Abr. 538. pl. 21.
2 Eq. Abr. 160. pl. 6.

law for breach of the agreement to recover damages; *i. e.* the difference between the price agreed on between the parties, and the price of corn on the market-day.

T. 1723, cor. M. R.
Celt & al. v. Williamson and
another,
2 P. Wms. 154.

15. A bill in equity lies to recover back money paid on a *bubble*, as in this case, against the projectors of a bubble called The Land Security and Oil Patent.

H. 1724, cor. Parker, C.
Hack v. Leonard,
9 Mod. Rep. 90.
2 Eg. Abr. 161. pl. 10.

16. An ejectment was brought by *A.* upon a lease for years made to *B.*, rendering rent, with a clause of re-entry on non-payment, and for non-performance of the covenants; the breach was assigned generally for non-performance of the covenants in the lease, and *A.* proved a breach of covenant for not keeping a barn well thatched; whereupon *A.* had a verdict, and *B.* was turned out of possession; and then *A.* died. A bill was exhibited against *A.*'s administrator to be relieved against the verdict, and to have a new lease granted for so much of the term of the first lease as was unexpired. Lord Chancellor said, he could not apprehend what damages the administrator could sustain, if the lessee suffered the buildings to be out of repair, so as he kept the main timber from being rotten, and left all in good repair before the end of the term. Therefore it was referred to a Master to see what damage was done (if any) by non-performance of covenants, and at what time.

T. 1724, in Scacc.
Vernon v. Minstull,
Bunb. 178.

17. Bill to be relieved against a judgment at law, though the matter suggested was a proper defence at law. Plaintiff was relieved, and an injunction granted to stay execution on the judgment.

M. 1714, in Scacc.
Bailey v. Cornes,
Bunb. 183.
Vide 1 Mod. 218. 1 Sid. 146.
1 Keb. 523. 562. Co. Litt. 146. 2 Inst. 491. 2 Cro. 666.

18. Bill brought for a preacher's pension only; the suit was compromised, but it was admitted that a bill would lie for a pension only.

H. 1725, cor. King, C.
Reeves v. Reeves,
9 Mod. 128. 132.
2 Eg. Abr. 161. pl. 11.

19. A bill to *compel trustees to enter to preserve contingent remainders*, is of the first impression, for their title is merely at law; but every remainderman hath a right to come into a court of equity, and pray the aid thereof, to compel persons to bring in the deeds and evidences relating to the estate.

6 Mar. 1726, Dom. Proc.
Walker v. Gascoigne,
2 Eg. Abr. 161. pl. 13.

20. *Equity will never countenance demands of an unfair nature*; as in this case, where it was for attending

tending at auctions as a puff to enhance the price of goods; nor will equity suffer them to be set up against just and fair demands. In an account, a cross bill for such purpose was dismissed with costs.

Gro. Rud. Law, 39.
Vide 13 Vin. 543. pl. 12.
where S. C. is cited as from a MS. Rep. said to be Lord Harcourt's.

21. A bill in equity lies to have a trial at law for the bounds of a manor.

27 Oct. 1726, Canc.
Letbult v. Castlemain,
Sel. Ca. in Chan. 60.
2 *Eg. Abr.* 161. pl. 12.

On such a bill each side must give notes of the bounds they claim; and if the jury find bounds different from the notes given by either side, those different boundaries to be indorsed on the *postes*. *Vide* the Bishop of Durham's case: and so it was ordered in the present case, only it being a trial at bar, it was ordered to be indorsed on the *habas corpus*. Same order made Nov. 4, 1726. *Hughes v. Geames. Ibid.* 62.

22. Bill to be relieved against a forfeiture for non-payment of rent, by a tenant at a rack-rent, after a recovery in ejectment. Decreed, that upon payment of the rent and costs at law and in equity, defendant do make a new lease for the remainder of the term to plaintiff; but a covenant to be inserted for the tenant to repair during the term, *though no such covenant was in the former lease.*

M. 1726, cor. King, C.
Taylor v. Knight,
2 *Eg. Abr.* 161. pl. 14.
4 *Vin.* 406. pl. 31.
Lord Chancellor said, he did not like giving relief in these cases after a judgment at law; but the precedents were too strong for him.

23. In some cases a bill in equity lies to be relieved after a verdict at law; for *per* Master of the Rolls—Although the court ought to be very tender how they help a defendant after trial at law, *in a matter where such defendant had an opportunity to defend himself* (a); yet there are cases in which equity will relieve in a matter where the defendant at law might properly have defended himself: as, if the plaintiff at law recovers a debt, and the defendant afterwards finds a receipt under the plaintiff's own hand for the money in question. Here the plaintiff recovered by verdict against conscience; and though the receipts were in defendant's own custody, yet not being then apprised of it, he seems entitled to the aid of equity, *it being against conscience that the plaintiff should be paid twice.* So, *if the plaintiff's own book appear to be crossed, and the money paid before the action brought.*

M. 1727, cor. M. R.
Countess of Gainsborough v. Gifford,
2 *Eg. Abr.* 162. pl. 15.
2 *P. Wms.* 424. 426.

(a) Where one recovered in trover against a servant of the African Company, on a bill brought against the plaintiff at law, equity would not relieve, *because the plaintiff in equity might at law have defended himself.* *Langdon v. African Company,* Prec. in Ch. 221. T. 1703.

24. A bill in equity will not lie to redeem a mortgage of chambers in an inn at court (*where the students are to enjoy quiet without disturbance*); but the plaintiff must apply to the Bench; and if not redressed there, then to the judges of the society: and the courts at *Westminster* have always declined (a) meddling therein. In the present case, the Master of the Rolls said he would not meddle with this title to chambers, which was *no legal one.*

But

H. 1728, cor. M. R.
Rakestraw & al. v. Brewster,
2 *Eg. Abr.* 162. pl. 16.
2 *P. Wms.* 511. Mos. 190.
Vide Sel. Ca. in Ch. 55. S. C. where it is said, his lordship obliged plaintiff to shew that the Benchers of Gray's-Inn would not determine in the matter, but had given leave to go to law. And this regard was to be had to all the societies of law, that all their

disputes might be terminated amongst themselves. And that Lord Keeper Wright refused to hear a cause of this nature, and sent it back to the Benchers. In the present case the court determined the right; but directed the Benchers to settle what was due for principal, interest, and costs, and to take an account of the several receipts and allowances.

(a) *Rex v. Gray's-Inn*, Dougl. 340. (b) Upon the same principle are the cases of *Keech v. Sandford*, 1 Eq. Abr. 741. pl. 7. *Taister v. Marriott*, Ambl. 668. *Raw v. Chichester*, Ambl. 715. *Owen v. Williams*, Ambl. 734. *Lee v. Lord Vernon*, 7 Bro. P. C. 432. *Pickering v. Vowler*, 2 Bro. Ch. Ca. 179j.

M. 1728, cor. King, C.
D'Aranda v. Whittingham,
Mof. 85.

Vide Bowyer v. Covert, 1 Vern.

95. *Jackson v. Rawlins*, 2 Vern. 195. *Cock v. Cross*, 2 Lev. 73. *Haight v. Langham*, 3 Lev. 300.

25. A bill will lie against the heir only for satisfaction of a bond, if the executor is out of the kingdom.

S. C. Or if he would not administer himself, and opposed the plaintiff in taking out administration, as principal creditor.

P. 1729, in Scacc.
Price, Clerk, v. Pratt, Bunt. 273.

26. Bill for tithes will not lie by a perpetual curate, for he has no apparent title, and his appointment is in its very nature revocable at law.

M. 1731, cor. King, C.
Fisher v. Brocas,
2 Eq. Abr. 163. pl. 20.
5 *Van. Abr.* 513. pl. 17.

27. A bill will not lie against the fire-offices, to recover a loss upon a policy occasioned by fire, where the assured lets the 15 days (allowed beyond the quarter-day for paying the premium) elapse without paying it: but if the offices accept their premium after the 15 days have elapsed, the court will hold them to their policy.

M. 1732, cor. King, C.
Cowper v. Clerk,
2 Eq. Abr. 163. pl. 22.
3 P. Wms. 157.

Vide Middleton v. Jackson, 1 Ch. Rep. 33. *Popham v. Lancaster*, 1 Ch. Rep. 96. *Disney v. Robertson*, Bunt. 41. *Baker v. Rogers*, Sel. Ca. in Ch. 74. *Corporation of York v. Pilkington*, 1 Atk. 282. *Bourvie v. Prentice*, 1 Bro. Ch. Rep. 200.

28. A bill cannot be brought by a single copyholder to be relieved against an excessive fine, because this ought to be tried by a jury: but a bill may be brought in order to settle a general fine to be paid by all the copyhold tenants of a manor, to prevent a multiplicity of suits. And Lord Chancellor said, with this diversity were the cases to be understood of *Middleton v. Jackson*, 1 Ch. Rep. (8vo.) 33; and *Popham v. Lancaster*, *ib.* 96. Bill dismissed in this case with costs.

M. 1732, Cane.
Chapman v. Spencer,
2 Eq. Abr. 163. pl. 21.

29. If a man claims lands in equity, but knows not the bounds, equity will grant a commission to ascertain them, when the right is established: but if the right be not settled, the party will be left to his remedy at law.

30. A bill in equity lies not for a *satisfaction*, where the thing sounds in *damages*; though it does to confirm a custom.

T. 1733, Cant.
Bowry v. Tracey,
2 *Eq. Abr.* 163. pl. 23.

31. A bill lies to compel a specific performance of an award to convey an estate (a) where the parties submitting has received the money, in consideration whereof he is to convey the estate sued for; and the court will give costs, it being a defence against conscience for the defendant to take the money, and then refuse to perform the award.

T. 1733, cor. M. R.
Hall v. Hardy,
3 *P. Wms.* 187, 190.
2 *Eq. Abr.* 28. pl. 35.
(a) *Note*; These decrees may not have been usual, because awards are commonly to pay money, in which cases a bill in equity is improper; but where the award is to do any thing collateral, as in

the present case, it is highly reasonable the defendant should make the conveyance; and the rather, for if the plaintiff had sued the bond at law, defendant would have been relieved in equity against the penalty upon a *quant. damnif.*; so that such a decree as the present prevents a suit in equity.

32. Though a bill in equity lies to recover a small quit-rent, yet it ought to appear that plaintiff has no remedy for the same at law, as where the lands out of which it is claimed are uncertain (a), or the days on which the same is payable are uncertain also.

P. 1734, cor. Talbot, C.
Holder v. Chamberly,
3 *P. Wms.* 256, 257.
2 *Eq. Abr.* 163. pl. 25.
(a) *Bouveriev. Prentice*, 1 Bro. Ch. Rep. 200. *North v. Earl of Strafford*, 3 *P. Wms.* 148. *Duke of Bridgewater v. Edwards*, 4 Bro. P. C. 139. *Duke of Leeds v. Powell*, 1 Ves. 171. *Duke of Leeds v. New Radnor Corporation*, 2 Bro. Ch. Rep. 338. 518.

S. C. A lord of a manor brings a bill against a tenant to hold a down belonging to the manor, discharged of a right of common thereto. This is an improper bill, in regard the plaintiff may by the same reason bring a separate bill against every tenant of his manor making the like claim (b).

Jackon, Bunb. 101. *Mayor of York v. Pilkington*, 1 Atk. 282. Lord Teynham v. Herbert, 2 Atk. 483.

(b) *Vide Disney v. Robertson*, Bunb. 41. *Mayor of Boston v.*

33. A bill in equity lies not to compel the performance of an agreement to pay money in consideration of having stifled a prosecution for felony; *secus*, if to stop a prosecution at law for a fraud, matters of fraud being cognizable and relieviable as well in equity as at law (a).

P. 1734, cor. Talbot, C.
Johnson v. Ogilby & al.
3 *P. Wms.* 279.
2 *Eq. Abr.* 31. pl. 39.
(a) *Vide Colt v. Woollaston*, 2 *P. Wms.* 156. *Stent v. Bailis*, 2 *P. Wms.* 220.

34. Where a title depends on the words of a will, this is as properly determinable in equity as by a judge and jury at *nisi prius*.

T. 1734, cor. Talbot, C.
Tanner v. Wise, 3 *P. Wms.* 296.
Ca. temp. Talb. 284.
2 *Eq. Abr.* 304. pl. 27.

35. A bill will lie to secure the benefit of a contingent interest, devised over; and in such case the costs shall be paid out of the assets of the testator, who by his will has occasioned the difficulty.

T. 1734, cor. Talbot, C.
Studholme v. Hodgson & al.
3 *P. Wms.* 301.
Vide Strains v. Madox, 2 *P. Wms.* 421.

36. A bill lies to compel the delivery of an altar-piece *undefaced*, or other curiosity in specie.

M. 1735, cor. Talbot, C.
Duke of Somerset v. Cookson,
1 *P. Wms.* 390.

2 *Eq. Abr.* 164. pl. 28. *Vide Cud v. Rutter*, 1 *P. Wms.* 570. *Colt v. Netterville*, 2 *P. Wms.* 304. *Pusey v. Pusey*, 1 Vern. 273. cited in argument on the part of defendant.

M. 1736, cor. Talbot, C.
Morrice v. Bank of England,
 Ca. temp. Talb. 217.
 2 Eq. Abr. 164. pl. 29. W. Kel. 43.

P. 1737, cor. Hardw. C.
Cock v. Martin, 2 Atk. 3.

37. Creditors may have a bill for relief against executors.

38. *Praying general relief* by a bill is sufficient, though the plaintiff should not be more explicit in the prayer of his bill; and Mr. *Robins* a very eminent counsel used to say, *general relief* was the best prayer next to the Lord's Prayer.

But *per cur.*—In this case *general relief* is prayed in one part of the bill, and *particular relief* in another; it must therefore stand over to be amended, paying the costs of the day.

16 Dec. 1738, cor. Hardw. C.
Roberdeau v. Rous & Un.
 1 Atk. 543.

39. An infant by his next friend may bring a bill for an account of rents and profits against a person who keeps possession after the death of the infant's ancestor.

P. 1739, Canc.
Sir John Webb v. Banks,
 2 Eq. Abr. 164. pl. 30.

40. A bill lies not to ascertain the bounds of a manor *in part*, unless plaintiff establish by proof *what shares he claims*.

24 May 1742, cor. Hardw. C.
Jackson v. Butler & al.
 2 Atk. 306. 9 Mod. 297.

41. Mortgage-deeds were put into defendant's hands to receive the principal and interest, but he pawned them to another of the defendants. Decreed the deeds to be delivered up, as upon the face of them it appeared the pawner could have no property in them, and held plaintiff's bill in equity was proper; for had he brought trover for the deeds, he could only have had damages for the detention of them, and not recovered the deeds themselves.

28 June 1742, cor. Hardw. C.
Bennet v. Vade & al.
 2 Atk. 325. 9 Mod. 312.

42. A person may bring a bill with two different aspects, that if one fails the other may as effectually answer the purpose for which the bill was brought.

4 Nov. 1743, cor. Hardw. C.
Bromley and others v. Goodere,
 and others, 1 Atk. 76.

43. Where bills are brought to settle the demands of creditors in bankrupt-cases, the rule of determination is the same as if heard upon petition.

28 Ap. 1744, cor. Hardw. C.
Dormer v. Fortescue, 3 Atk. 132.

44. Bill for an account of the rents and profits of an estate which had come into the possession of the plaintiff. Lord H. said, if the plaintiff had not made such a case as will entitle him to an account, praying *general relief* will not entitle him.

45. Trustees to preserve contingent remainders may bring a bill to stay waste for the benefit of the contingent remainders: so may a second tenant for life against a first, where if the first tenant for life should die without sons, the second tenant for life will have an interest in the mart and shade of the timber.

30 June 1744, cor. Hardw. C.
Parrot v. Parrot, 3 *Ash.* 94.

46. Bill will not lie against a tenant for an account and satisfaction for waste in cutting timber, without praying an injunction to stay waste.

4 Nov. 1745, cor. Hardw. C.
Jesus College v. Bloom,
Ambl. 54. 2 *Ash.* 262.
1 *Eq. Abr.* 75.

Vide Whitfield v. Bewick, 2 P. Wms. 240. 3 P. Wms. 267.
1 P. Wms. 406.

Bishop of Winton v. Knight

S. C. Nor will it lie for an account and satisfaction for stones picked and carried from off the land.

47. A bill will not lie to amend a mistake (on the rolls of a manor) in the description of a party to a common recovery, especially after a length of time, and against a purchaser.

2 July 1750, cor. Hardw. C.
Bell v. Cundall, *Ambl.* 101.
1 *Eq. Abr.* 75.

48. A bill lies for satisfaction of a specialty debt out of real or personal assets, which debt may be created voluntarily by the testator: but if it appears doubtful whether it is a specialty, or so uncertain that it cannot be settled without a jury, the court will send it to law, though unless that is absolutely necessary, the court will not make two suits out of one.

24 July 1750, cor. Hardw. C.
Williamson v. Codrington,
1 *Ves.* 514.

49. A bill lies for a creditor by *elegit* to set aside a fraudulent conveyance, whether he could recover at law or not.

6 Nov. 1750, cor. Hardw. C.
Bennett v. Mulgrove, 2 *Ves.* 52.

50. A bill will not lie for a patron against the incumbent, to have satisfaction for the profits of waste committed by him.

T. 1753, cor. Hardw. C.
Knight v. Mosely, *Ambl.* 176.

51. A bill lies for a partition, as matter of right; and no instance of its being refused but in case of want of title: and in a case of *Cartwright v. Lord Bath*, the court gave leave and time for plaintiff to make out his title. In partition each party must be at equal expence, though their interests be ever so unequal*.

6 July 1754, cor. Clarke, M. R.
Parker v. Gerrard, *Bart.*
Ambl. 236.
1 *Eq. Abr.* 75.

* *Vide Nevil v. Levene.*

52. A bill lies of course to have a legacy secured, which is payable at a future day, viz. in 10 years.

10 June 1755, cor. M. R. abf. C.
Ferrand v. Prentice,
Ambl. 273.

Vide Johnson v. Delacruize, 17 July 1749.

P. 1779, cor. Thurlow, C.
Saint Luke v. Saint Leonard,
 1 Bro. Ch. Rep. 40.
 1 Eq. Abr. 75.

53. A bill will not lie for an issue to ascertain the boundaries between two parishes. The parishioners have no *common right* in the *boundaries*; and it would be to try the boundaries of all the parishes in the kingdom for the sake of the poor-laws.

28 Mar. 1783, cor. Thurlow, C.
Bowyer v. Prentice,
 1 Bro. Ch. Ca. 200.
 1 Eq. Abr. 75.

Vide Collet v. Jacques, 1 Ch. Ca. 79. *Davy v. Davy*, 1 Ch. Ca. 144. 1 Rol. Abr. 375. 378. *Finch*, 241. 256. *Holden v. Chambrury*, 2 P. Wms. 256. *Benfon v. Baldwyn*, 1 Atk. 592.

54. A bill does not lie against several tenants of a manor for quit-rents, the party having a remedy at law, where the boundaries are *certain*. But if terre-tenants confound the boundaries, in order to prevent a distress, the lord is entitled to a commission to ascertain them.

H. 1788, cor. M. R. abf. C.
Taylor v. Haylin,
 2 Bro. Ch. Ca. 310.
Vide next case.

55. A bill to open an account must state *specific* errors. Whosoever goes into equity to unravel an account must shew clear grounds, otherwise every transaction would produce a suit.

T. 1791, cor. Thurlow, C.
 on appeal from the Rolls.
Johnson v. Curtis,
 3 Bro. Ch. Ca. 266.

56. A bill to open a settled account must state specific errors; not generally that it is erroneous.

Vide Taylor v. Haylin, 2 Bro. Ch. Ca. 310. S. P.

P. 1792, cor. Thurlow, C.
Catbcart v. Lewis,
 3 Bro. Ch. Ca. 516.

57. Where a bill is to enforce a *Jamaica* judgment, it must shew the *legal effect* of the judgment in *Jamaica*, otherwise it is demurrable to.

T. 1792, cor. M. R.
Elmslie and others v. McAuley
and others,
 3 Bro. Ch. Ca. 624.

58. A creditor of *A.* cannot maintain a bill against the representatives of *B.*, to a part of the residue of whose estate *A.* is entitled as a *legatee*.

If such a bill were permitted, every simple creditor of *A.* might file a bill against *B.*'s representatives. It is impossible to maintain such a bill, unless the executrix of *B.* had colluded with the person possessed of the fund, then such a bill might be supported. Plaintiffs should have made a special application to be let in before the Master, and have desired that the executrix of *B.* might pursue her testator's effects or that they might use her name for that purpose. All collusion is denied and none is proved, and it would be a monstrous proposition to say such a bill could be supported. Again, if a bill were maintainable by every creditor upon the fund, so it might be brought against every debtor to the fund, and the records of the court would be loaded with expensive suits.

M. 1792, in Scacc.
Wools v. Walley, 1 Anstr. 100.
Vide Bunb. 193.

59. In a bill for the single value of the tithes it is not necessary expressly to waive the treble value.

M. 1792, in Scacc.
Lee v. Shoubred, 1 Anstr. 83.

60. On a bill to obtain evidence for a defence at law, when the evidence is obtained, the court cannot proceed to give relief, although the party cannot have the effect of the evidence at law, from objections of form. Bill dismissed.

H. 1793, cor. Lds. Comrs.
Nabob of Arcot v. East India
Company,
 4 Bro. Ch. Ca. 180.
Vide Sherman v. Sherman,

61. A bill in this court cannot be maintained by a *sovereign prince* in *India* against the *East India Company*, for an account of monies, &c. paid in consequence of *treaties*, in the nature of *federal conventions*.

conventions for the protection of their respective territorial possessions.

2 Vern. 276. *Sturt v. Mellish*,
2 Atk. 610.

62. Bill lies to set aside for fraud an award made a rule of a court of law under 9th and 10th Will. 3. c. 15.

2 Aug. 1794. cor. Loughb. C.
Lord Lonsdale v. Littledale,
2 Ves. jun. 451.

An award in a cause depending is not within the statute.

Vide *Lucas v. Wilson*, 2 Burr.
701.

63. The defendant sued at law on an indemnity bond: the plaintiff filed his bill for an injunction, without offering to make any recompence for the damage actually sustained. The bill was for that cause dismissed.

H. 1795, in Scacc.
Godbolt v. Watts,
2 Anst. 543.

See more, *post*, sections 5. 8, 9, 10, 11. 13. 15, 16, 17.

See also the several matters for which bills in equity may be brought, under their respective titles.

Sec. 4. Of amended Bills.

1. *A.* Settles an equity of redemption for a jointure, and afterwards becomes a bankrupt: the assignees settle an account with the mortgagee: the jointress shall be bound by this account, unless she can shew particular errors; she, however, had leave to amend her bill.

T. 1683, cor. North, C. 8.
Knight v. Bamfield & al.
1 Vern. 179.

2. No proceedings upon an amended bill till the costs of the former proceedings are discharged.

6 Dec. 1705, Canc.
Gage v. Lister,
2 Eq. Abr. 172. pl. 1.
4 Vin. Abr. 444. pl. 9.

3. Where new matter is suggested by an amended or supplemental bill, foreign and repugnant to the title set up by the original bill, there can be no proceedings against the defendant without serving him with a subpoena *ad faciend. attornat.*; nor ought the cause to be brought to a hearing without such service, because the defendant should have an opportunity of defending himself against the new matter.

7 March 1720, Dom. Proc.
Chevers & al. v. Geoghegan and another,
2 Bro. P. C. 225.
4 Vin. Abr. 443. c. 6. 448. s. 10.
7 Vin. Abr. 339. c. 17.
2 Eq. Abr. 172. c. 2.

4. Although an answer be put into the original bill, yet defendant may demur to the amended bill.

21 Nov. 1712, in Scacc.
Lowther v. Whorwood,
Burb. 120.

Vide *Asgill v. Dawson*, *Hely v. Clarke*.

5. An infant is not bound by the decree of a court of equity, but must have a reasonable time after he comes of age to shew cause against it.

10 Feb. 1724, Dom. Proc.
Lord Effingham & al. v. Sir John Napier, Bart. & al.
3 Bro. P. C. 1.

And

2 C. 1 May 1727, in Dom. Proc.

And upon his coming of age he may amend his answer, or put in a new answer; but he cannot amend an original bill in any points wherein it has been dismissed upon the merits.

T. 1725, cor. Lord Lechmere
in Duchy Chamber,
*Lord Coningsby v. Sir Joseph
Jekyll, M. R.*
2 P. Wms. 300.

2 Eq. Abr. 59. pl. 3.

(a) It was also said by Talb. C.

9 Dec. 1736, in — v. Baines, that after a demurrer to the whole bill is allowed, the bill is out of court, and there is no instance of leave to amend. *Vide* Mitf. Ch. Pleadings, 15. (n.)

H. 1727, cor. King, C.

Steward v. Roe,

2 P. Wms. 435.

Vide Child v. Frederick, 1 P.

Wms. 266. Long v. Burton,

2 Atk. 218. Rattray v. Darley,

3 Atk. 724.

Note; The case of Long v. Burton goes farther, than the principal case, because there the answer to the original bill was sufficient.

6. On a demurrer to a bill in the Duchy Chamber, the demurrer was allowed; and the chamber of the duchy gave plaintiff liberty to amend his bill, which the defendant, the Master of the Rolls, insisted to be utterly irregular (a).

7. The original bill is to be first answered; but if the plaintiff in that bill will, after the cross bill filed, amend his bill in things material, this amended bill, as to the amendments, is a new bill; and plaintiff in the original bill shall not be bound to answer the cross bill which was filed prior to the amendments in the original bill, until he shall have answered to his amendments: and as the amended bill must be answered altogether, so the priority seems to be lost as to the whole.

H. 1734, cor. Talbot, C.

Humphrey, Esq. v. Humphreys, Bart.

3 P. Wms. 351.

2 Eq. Abr. 172. pl. 3.

8. The bill charged, by way of amendment, matters which arose after the filing of the bill, and held this might be done either by way of supplement or amendment.

P. 1737, cor. Hardw. C.

Cook v. Martin, 2 Atk. 3.

9. Where general relief is prayed in one part of a bill, and particular relief in another, it must stand over to be amended, upon paying the costs of the day.

23 Mar. 1738, cor. Hardw. C.

Ann. 1 Atk. 51.

10. After publication past, a plaintiff cannot amend his bill without withdrawing his replication; and there is no instance of a plaintiff's obtaining such an order to amend.

26 Jan. 1739, cor. Hardw. C.

on appeal,

Davis v. Davis, 2 Atk. 24.

8 Vin. Abr. 423. pl. 35.

N. B. This matter was never determined, for the parties agreed to affirm the decree, and this agreement was made an order of court.

11. Lord *Hardwicke* inclined to think, that where there is an amended bill and no answer put in to it, the plaintiff is entitled to a decree *pro confesso*, abstracted from any proceedings in the original cause.

H. 1740, cor. Hardw. C.

Brindell v. Tompson, Bart.

Barnard, 332.

2 Eq. Abr. 60. pl. 7.

12. Where three or four orders are obtained for the amendment of a bill, and new engrossments made under those orders, the rule is, if the plaintiff moves for further liberty to amend his bill, he shall pay full costs to be taxed.

13. Where

13. Where amendments are so large that they cannot be added, there a new engrossment, and a new service on the parties, is necessary.

24 Jan. 1740, cor. Hardw. C.
Vernon v. Pawdy,
2 Atk. 119.

14. After a plaintiff has had a third order to amend his bill, he shall not be allowed to do it but upon costs to the defendant, to be taxed by the Master.

12 Feb. 1740, cor. Hardw. C.
Anon. 2 Atk. 123.

15. If after a cross bill filed, a plaintiff in an original bill will amend it in material parts, and thinks fit to compel an answer to the amendments at the same time with the original bill, he waives his priority of answer to the original bill,

12 Nov. 1741, cor. Hardw. C.
Long v. Burton, 2 Atk. 218.
Vide Steward v. Roe, 2 P.
Wms. 435. *Child v. Frederick*,
1 P. Wms. 166. *Rattray v.*
Darley, 3 Atk. 724.

S. C. Where a bill is amended both in discovery and relief, the pendency of the suit as to those parts which are amended, is only from the time of the amendment.

16. After publication is past, and the cause set down, the bill can only be amended by making parties, and plaintiff cannot introduce new charges, or put a material fact in issue, which was not so in the cause before, but he must prefer a supplemental bill in such case.

3 July 1746, cor. Hardw. C.
Goodwin v. Goodwin and others,
3 Atk. 370.

17. Lord *Hardwicke* in this case said he thought the court had gone rather too far in allowing the amendment of bills on answers being reported insufficient, as it had frequently been made use of as a scheme for delay.

21 May 1747, cor. Hardw. C.
Anon. 3 Atk. 512.

18. A plaintiff by a false suggestion *that the cause was at issue only*, when it was in the Chancellor's paper for hearing, obtained an order at the Rolls for liberty to amend his bill. The order was discharged, and the cause put off till the next term, on paying the costs of the day, that the plaintiff might have an opportunity of amending his bill.

21 Nov. 1747, cor. Hardw. C.
Harding v. Cox, 3 Atk. 583.

19. An order was made in this cause for the amendment of the bill without costs, it not requiring further answer; the amendment was by praying an injunction. Held, the defendant might answer *gratis*.

18 Jan. 1749, cor. Hardw. C.
Sawory v. Dyer, *Ambl.* 70.
1 Eq. Abr. 32.

20. Plaintiff amends his bill several times; he shall not pay taxed costs, but 20s. only, and this is the general rule.

H. 1788, cor. Thurlow, C.
Earl of Massereene v. Lynden,
2 Bro. Ch. Cas. 291.

T. 1789, cor. Thurlow, C.
Foster v. Foster,
 2 Bro. Ch. Ca. 616.

21. When a bill is amended, though a defendant is not bound to answer, he may, if his interest is affected; and if he does not, he shall be bound by the charges.

6 May 1790, cor. Thurlow, C.
Motteux v. Mackreth,
 1 Ves. jun. 142.

22. The evidence of a plaintiff being necessary, and defendant refusing to consent to his examination, the bill on motion was amended by making him a defendant, and the replication was withdrawn on terms of costs, amending defendant's copy, and requiring no farther answer.

T. 1790, cor. Thurlow, C.
Lord Abingdon v. Butler & another, 1 Ves. jun. 210.
 But new subpoenas are not necessary. *Vide Angerstein v. Clarke*, 1 Ves. jun. 250.

23. A bill being amended after answer, plaintiff must pay costs, for that then it is considered as an original bill. The plaintiff however is not bound by his offers in the original bill, nor the defendant by the submissions in his answer.

M. 1790, cor. Thurlow, C.
Angerstein v. Clarke,
 1 Ves. jun. 250.

24. On an amended bill it is not necessary to serve new subpoenas on the original defendants.

In *Hinde's Ch. Pract.* 22. it is said, if a further answer be required, then a new subpoena to appear and answer must be served.

After witnesses examined, no amendment permitted. *Vide Barnard.* 223. Mitf. 53.

An amended bill is taken as a new bill for certain purposes.

12 Mar. 1792, cor. Thurlow, C.
Jennings v. Pearce,
 1 Ves. jun. 447.

25. After a plea has been set down, an order was obtained of course by plaintiff to amend his bill, and served on the defendant. Plaintiff not appearing when the plea came on to be argued, it was allowed (a) of course with costs.

(a) *Vide Hinde's Ch. Pract.* 225. *Harr. Ch. Pract.* 271.

S. C. An amended bill is out of court by an allowance of a plea posterior to the date of the amended bill; otherwise if prior.

Ordo Curiae, 23 Jan. 1794,
 Per Loughborough, C.
 & Arden, M. R.
 4 Bro. Ch. Ca. 544.

26. The delay of defendants in putting in their answers being considered, *ordered*, that on a third application for time, defendant do consent to enter his appearance with the Registrar within four days, consenting that the Serjeant at Arms shall go against him as on a commission of rebellion *non est invent.* in case he does not put in his answer by the time granted. That on a second application for time to answer an amended bill, or after exceptions allowed, defendant do consent to same terms.

But not to preclude an application to the court under special circumstances.

M. 1796, in Scacc.
Longman and others v. Callisford,
 3 Anst. 807.

27. After an order *nisi* to dismiss for want of prosecution, the plaintiff filed a replication, and afterwards moved to withdraw the replication and amend,

amend, on affidavit of materiality; he must also shew why the facts introduced by the amendment could not have been stated before.

28. Where the bill is amended after answer, by adding a defendant, the original defendant cannot answer the amended bill, nor have any order for time to answer.

H. 1797, in Scacc.
Gill v. Matthews,
3 Anst. 379.

See *post*, sect. 14. Of Cross Bills.

Sec. 5. Of Bills of Revivor, and Bills in the Nature of Bills of Revivor.

1. **D**Emurrer to a bill of revivor, because the plaintiff had not revived against all the defendants. *Per cur.*—It is not necessary to revive against defendants who have not answered.

H. 1634, Canc.
Oxburgh v. Fincham,
1 Vern. 308.

2. Adjudged, that where a suit abates, plaintiff may either bring an original bill, or a bill of revivor at his election.

T. 1687, cor. Jeffries,
Spencer v. Wray,
1 Vern. 463.
In Anon. 3 Atk. 486. Lord

Hardwicke mentions this case as the foundation of the rule, and assigns as a reason that plaintiff may think he can state a better case than he did by his first bill.

3. Where a mutual account is decreed, and there happens an abatement, defendant may revive.

H. 1690, Canc.
Lord Stowell v. Cole,
2 Vern. 219.

4. An administrator obtains a decree and dies; the administrator *de bonis non* may revive within the equity of 30 Car. 2. c. 6.

M. 1691, Canc.
Owen v. Curzon, 2 Vern. 237.

5. A defendant may revive as well as a plaintiff in case of abatement.

T. 1693, Canc.
Lady Stowell v. Cole,
2 Vern. 297.

6. Plaintiff's intestate obtained a decree against defendant for a sum of money, and also for conveying lands and delivery of deeds, but before any thing was done, he died. Plaintiff brought a *sci. fa.* to revive. Defendant demurred, because the heir was not a party, and a decree cannot be revived by parts. The court allowed the demurrer as to the realty, but ordered the decree to be revived as to the personalty.

M. 1701, Canc.
Ferrers v. Cherry,
1 Eq. Abr. 3. pl. 11.
Vide 2 Vern. 384. and 1 Eq. Abr.
331. pl. 5. S. C. but not S. P.

7. Held in this case, that where a decree is for an account, and then the cause abates by defendant's death, his representative may revive as well as the plaintiff, for they are both in the nature of plaintiffs.

P. 1702, cor. Wright, C. S.
Kent v. Kent, *Proc. in Ch.* 167.
Vide Anon. 3 Atk. 691.

P. 1706, cor. Cowper, C. S.
Clare v. Wordall,
 2 Vern. 548.
 1 Eq. Abr. 3. pl. 3.

8. A devisee brings an original bill in nature of a bill of revivor. *Quere*, If defendant can make a new defence? *Per cur.*—Where the bill, though original, is only to supply the want of privity, and is in all other matters but as a bill of revivor, the decree ought to be carried on in the same manner as it would have been upon a bill of revivor, if the plaintiff had claimed in privity. There is no reason why the devisee should not have the same advantage of the decree as an heir or executor, without again entering into the merits, and the decree ought to be neither longer nor shorter than the first decree.

P. 1711, cor. Harcourt, C. S.
Minshall v. Lord Mohun,
 2 Vern. 672.
 1 Eq. Abr. 3. pl. 4.
 2 Bro. P. C. 523.
Vide Clare and Wordell, *ante*.
Vide Page v. Page, Mos. 44.
 where Lord King has held that a

9. Upon a bill in nature of a bill of revivor against a devisee, the devisee cannot dispute the justice or validity of the decree, for then a devisee would be in a better case than the heir or executor.

bill of revivor cannot be brought against a devisee.

M. 1714, Canc.
Child & al. Assignees, v. Frederick,
 2 Eq. Abr. 180. pl. 2.
 1 P. Wms. 266.
Vide Stewart v. Roe, 2 P.
 Wms. 435. Long v. Barton,
 2 Atk. 218. Rattray v. Darley,
 3 Atk. 724.

10. *A.* brings his bill against *B.* and *C.*, who put in an insufficient answer, and bring their cross bill against *A.* *B.* becomes a bankrupt, and his assignees bring their bill in nature of a bill of revivor against *A.* They shall not go on till *C.* has answered *A.*'s bill.

17 Feb. 1717, Dom. Proc.
Berne, Widow, and another v.
Hartpole & al.
 2 Bro. P. C. 44.

11. A redemption of a stale mortgage was decreed, after the mortgagee had been in quiet possession for 68 years; but this decree being made upon a *bill of revivor*, was held to be improper, and therefore the decree was reversed, but without prejudice to the question, whether the estate was redeemable or not, whenever it should be brought into judgment by a proper bill.

16 June 1727, Dom. Proc.
Osborne, Bari. v. Usher, Esq.
and others.
 2 Bro. P. C. 314.
 2 Eq. Abr. 3. note to ca. 7.
Vide Wingfield v. Whaley,
 4 Vin. Abr. 432. pl. 17. (n.)

12. Where a suit abates by the death of the plaintiff, a person claiming *per formam doni*, and not as heir or representative of the deceased, plaintiff cannot revive; but must bring his original bill, or commence an action at law.

M. 1724, cor. King, C.
Earl of Hindsford v. De Costa,
 Sel. Ca. in Ch. 4.

13. Plaintiff made his election to proceed at law, where he failed; he may yet revive his bill, for that does not preclude his right.

M. 1725, Canc.
Huet v. Lord Say & Selr,
 Sel. Ca. in Ch. 53.
 2 Eq. Abr. 2. & 3. 7.

14. Bill of partition was brought by several persons; one dies, who devises his part to co-plaintiff, and makes him executor; he brings a bill of revivor, to which it was demurred. Bill of revivor, and

and bills in nature of bills of revivor, are very different. A bill of revivor can only be brought by the * heir as to the realty, and by an executor or administrator as to the personalty. On bills of revivor the estate continues the same as before abatement, but here in case of a devisee, who is a purchaser, the estate is altered †, and a purchaser can never revive. Demurrer allowed, but leave given to amend the bill, and revive as executor, though an original bill in the nature of a bill of revivor as devisee was thought the most proper method.

* *Vide* Osbourne and Usher,
2 Bro. P. C. 314. Wingfield v.
Whalley, 4 Vin. Abr. 432.
pl. 17. (n.)

† *Vide* 2 Freem. 132. 2 Eq.
Abr. 2. c. 2.

15. In 1717 a bill was brought to redeem or be foreclosed, and likewise a cross bill to redeem, on which was a decree for payment of principal, interest, and costs, or else to be foreclosed, and on paying to be let in. The mortgagor died, and the account being taken, and the plaintiff finding the estate insufficient, brings a new bill of revivor, and partly a supplemental bill, to review the former decree, and have an account of the assets of the mortgagor, and thereout to have satisfaction for a bond which was given as a collateral security. Defendant, who was executor of the mortgagee, pleaded the former decree in bar, that the plaintiff elected his satisfaction, and had not so much as suggested the satisfaction deficient, so that he might have received double satisfaction; and that it was plain he had not waived his mortgage by his bill of revivor. *Per cur.*—Plaintiff by his revivor has not waived the mortgage, or so much as suggested a deficiency, the plea must stand for an answer, without liberty to except.

H. 1726,
Birch's case, Gilb. Eq. Rep. 136.
2 Eq. Abr. 72. c. 18.
Vide Geale v. Wyntour in
Scacc. Bunn. 211.

16. Held in this case, that if some of the plaintiffs refuse to join in a bill of revivor, the others may bring such a bill, and make those who refuse defendants; and it was agreed, that a defendant may bring a bill of revivor (a) as well as a plaintiff.

M. 1727, Canc.
Finch v. Lord Winchelsea,
1 Eq. Abr. 2. pl. 7.
1 P. Wms. 277. S. C. but not S. P.
(a) *Vide* Lord Stowell v. Cole,
2 Vern. 219. Lady Stowell v.
Cole, 2 Vern. 296.

17. Pending the account the mortgagee dies, and a bill of revivor is filed against his administratrix. She pleads, that the suit could not be revived against her, because she was *cestuy que trust* of the mortgaged premises, and was not a defendant to the original bill. This is not a good plea, because the cause is not revived against her in her own right, but only as representative of the mortgagee.

M. 1728, cor. King, C.
Welch v. Fish, Mos. 38.
Vide Lord Stowell v. Cole,
2 Vern. 219. Lady Stowell v.
Cole, 2 Vern. 296.

M. 1728, cor. King, C.
Page & al. v. Page & al.
 Mos. 44.

Vide 1 Ch. Ca. 174. 231. 123.
Clare v. Wardell, 2 Vern. 548.

H. 1734, cor. Jekyll, M. R.

Harris v. Pollard & al.

3 P. Wms. 348.

2 Eg. Abr. 2. pl. 4.

(a) His Honor consulted the register in this case as to the practice; but the reporter says, he apprehended the practice of reviving proceedings was only on defendant's time for answering being out, and upon his answering

18. A bill of revivor will not lie against a devisee.

Dan v. Allen, 1 Vern. 283. *Dunn v. Allen*, 1 Vern. 426.
Minshull v. Lord Mohun, 2 Vern. 672.

19. If the defendant's time for answering be out, the court will order proceedings to be revived (a). So though the defendant by his answer insists that the plaintiff is not entitled to revive, for this ought to be shewn either by plea or demurrer, but if in such case it appears that the plaintiff had no title to revive, he cannot have a decree.

and not opposing the revivor.

19 Mar. 1736, cor. Hardw. C.
Brown v. Higden, 1 Atk. 291.

20. It is a constant rule, that matters subsequent to the original bill must come by way of supplemental bill and revivor.

S. C. Though by the 8 W. 3. a suit shall not abate upon the death of one defendant, yet it must be taken with this restriction, that the subject-matter of the bill is not hurt thereby.

3 May 1738, Dom. Proc.
Ryland v. Green and another,
 Executors,
 4 Bro. P. C. 348.

21. Where a person sues as a protestant discoverer under the popery acts, he becomes entitled to the rents and profits of the estate from the time of filing his bill; and if he dies pending the suit, having made a will, those rents and profits will belong to his devisee. But such devisee cannot regularly exhibit a bill of revivor, but must exhibit an original bill, as a protestant discoverer in his own right.

M. 1739, in Scacc.
Harrison v. Ridley & al.
 2 Eg. Abr. 3. pl. 8.
 Com. Rep. 589.
Vide *Dan v. Allen*, 1 Vern. 283.
Dunn v. Allen, 1 Vern. 426.

22. *B.* had exhibited his bill to be relieved against securities entered into by him to defendant. Defendant answered; then *B.* was discharged under the insolvent act, and his effects transferred to the clerk of the peace, who assigned them to the now plaintiff, who thereupon brought a bill of revivor to revive the proceedings in the original suit brought by *B.* Defendants, as to so much of the bill as prayed to revive, demurred, which the court allowed: for plaintiff, *the assignee of the clerk of the peace, could not revive*, there being no privity between *B.* and him; and it is the constant course, that an assignee or devisee cannot revive, but must proceed by original bill, which is indeed in the nature of a bill of revivor.

But this bill must pursue the first: and in case of any material difference between them (except what relates to the title to revive) the defendant may demur, and the bill be dismissed.

S. C. In a bill of revivor it may be necessary to insert so much new matter as may be requisite to shew how the party becomes entitled to revive.

23. It is not necessary to make the defendants in an original bill parties to a supplemental one in the nature of a bill of revivor; nor at the hearing can those defendants object for want of parties.

P. 1745, cor. Hardw. C.
Jones v. Jones, 3 Atk. 217.

24. A plaintiff on the death of a defendant is not obliged to bring a bill of revivor, but may file a new bill, because he may be able to state a better case.

6 May 1747, cor. Hardw. C.
Anon. 3 Atk. 486.
Vide Spencer v. Wray, 1 Vern.
 463. where this rule is laid down.

25. A defendant cannot revive but in one instance, and that is after a decree to account, because in that case he is considered as an actor, for till the account is taken it is not known on which side the balance lies.

24 Jan. 1748, cor. Hardw. C.
Anon. 3 Atk. 691.

26. After the act of 5 Geo. 2. c. 25. for making process in the courts of equity effectual against persons who abscond, there was a doubt whether it extended to bills of revivor; but it is now settled that it does.

10 Nov. 1748, cor. Hardw. C.
Anon. 3 Atk. 690.

27. Sequestration to compel performance of a decree abated by the death of the plaintiff; as also the suit abates, a further act being necessary; so that a bill of revivor must be: no *subp. sci. fa.* as the decree was not signed and inrolled.

17 Dec. 1748, cor. Hardw. C.
Wharham v. Broughton,
 1 Vef. 182.
Vide Bligh v. Lord Darnley,
 2 P. Wms. 619. *Colston v.*
Gardner, 2 Ch. Ca. 43. *Bland*
v. Witham, Lord Athol's case.
Burdet v. Rockley, *Hyde and another v. Greenhill*, *Clerk v. Withers*, 2 Raym. 1072.

28. Upon a bill of revivor, plaintiff cannot dispute the decree, though defendant may.

9 Mar. 1751, cor. Hardw. C.
Robinson v. Robinson,
 2 Vef. 232. (n.)

29. A cross bill had been dismissed with costs; but before they were taxed the plaintiff died; and the question was, whether the defendant could revive, or there could be any method of proceeding in respect of these costs. On the circumstances of this case, though the plaintiff died before the costs were taxed, yet the defendant may revive for those costs.

7 Aug. 1754, cor. Hardw. C.
Kemp v. Mackrell, 3 Atk. 812.
 2 Vef. 579.
Vide White v. Hayward,
 2 Vef. 461.
Johnson v. Peek, 2 Vef. 465.

30. Plea to bill of revivor for costs ordered to be paid into the bank, over-ruled.

H. 1785, cor. Thurlow, C.
Hall v. Smith,
 1 Bro. Ch. Ca. 438.

31. Where the defendant has appeared to and answered the original bill, if he cannot be found to be served with a subpoena to answer the bill of revivor, plaintiff must proceed under the act 5 Geo. 2. to have the bill taken *pro confesso*.

M. 1786, cor. Thurlow, C.
Henderson & al. v. Meggs & al.
 2 Bro. Ch. Ca. 127.
Vide Anon. 3 Atk. 690.

See Abatement, Costs, Decree.

Sec. 6. Of Supplemental Bills, and Bills in the Nature of Supplemental Bills.

H. 1682, cor. North, C. S.
Price v. Keyte,
 3 *Eq. Abr.* 80. pl. 2. 1 *Vern.* 135.

7 Mar. 1720, Dom. Proc.
Crofters & al. v. Googbegan and another, 2 *Bro. P. C.* 225.
 4 *Vin. Abr.* 443. c. 10.
 7 *Vin. Abr.* 339. c. 17.
 2 *Eq. Abr.* 172. pl. 2.

31 Mar. 1725, Dom. Proc.
Bagenal v. Bagenal & al.
 3 *Bro. P. C.* 51.
 2 *Eq. Abr.* 172. pl. 4.
 4 *Vin. Abr.* 439. pl. 8, 9.

M. 1728, cor. King, C.
Welf v. Fish, Mof. 38.
Vide Lord Stowell v. Cole,
 2 *Vern.* 219.
Lady Stowell v. Cole, *Ib.* 296.

H. 1734, cor. Talbot, C.
Humpbreds Esq. v. Humpbreds
Bart. 3 *P. Wms.* 351.
 2 *Eq. Abr.* 172. pl. 3.

19 Mar. 1736, cor. Hardw. C.
Brown v. Higden, 1 *Atk.* 291.

50 Nov. 1739, cor. M R.
Anon. 1 *Atk.* 88, 89.

* Because there is no privity between them and the bankrupt, or at least but an artificial one; and yet if a supplemental bill was not allowed the costs of the former suit would be absolutely thrown away.

Note; His Honor put a case in support of his determination:—Suppose an estate had been twenty years in controversy, and *pendente lite* is purchased, the purchaser is liable to all the costs from the beginning

1. IN a bill of review, a new supplemental bill may be added.

2. Where new matter is suggested by an amended or supplemental bill, foreign and repugnant to the title set up by the original bill, there can be no proceedings against the defendant without serving him with a *subpoena ad faciend. attornat.*; nor ought the cause to be brought to a hearing without such service, because the defendant should have an opportunity of defending himself against the new matter.

3. After publication the plaintiff files a supplemental bill, and examines witnesses to prove matters which were in issue and not proved in the original cause. Held to be irregular, and the supplemental bill dismissed.

4. Mortgagor brings a bill to redeem, on payment of what is due; and a decree is made accordingly. Pending the account the mortgagee dies, and a supplemental bill is filed against his administratrix for a discovery of assets: the administratrix demurred, and her demurrer was allowed, because the plaintiff (as appeared by the bill and decree) could have no demands out of them.

5. Matters arising after the filing the bill, may be charged by way of amendment as well as supplement.

6. It is a constant rule, that matter subsequent to the original bill must come by way of supplemental bill and revival.

S. C. Although by 8 *W.* 3. a suit shall not abate upon the death of one defendant; yet it must be taken with this restriction, that the subject-matter of the bill is not hurt thereby.

7. Where the assignees of a bankrupt die, or are discharged, and others are chosen in their room, they cannot revive *, but must bring a supplemental bill to entitle themselves to the benefit of proceedings in a former suit.

gining to the end of the suit, for he comes into court *pro bono et malo*. For these reasons his Honor determined that the new assignees should have the benefit of the former proceedings in the suit commenced by the old assignees.

8. *A.* brings a supplemental bill containing new matter discovered since the filing of his original bill, and a decree pronounced thereon (but not signed and inrolled); and at the same time a petition of rehearing in the nature of a bill of review, praying that the former decree might be rectified in the particulars complained of by the supplemental bill. *Per cur.*—Although this method was not then of long standing, yet there had been some precedents of it, viz. one in Lord Talbot's time, and two in the then Chancellor's; and it is of itself a reasonable thing that this method should be allowed of where a decree is not signed and inrolled. It is founded upon reason; because if *A.* should be obliged to sign and inrol a decree which he thinks himself aggrieved by, and then bring a bill of review, it would only tend to increase expence and vexation: whereas the method which *A.* has taken attains the justice of the case as fully as the other would. Indeed this method should be put under some restriction as well as the other; and as in the other method of a bill of review, *A.* must have annexed an affidavit thereto, that the matter on which he founds his relief has come to his knowledge since the time of the decree; so it is fit an affidavit of this sort should be annexed to a supplemental bill: but, according to the former precedents, that was not required; and therefore it could not be insisted on in this case.

9. When a supplemental bill is brought for new matter discovered since the hearing of a cause before the former decree was signed and inrolled, if defendant is able to shew that there is no new matter discovered, he must take advantage of it by plea or demurrer; for it is too late to insist on it at the hearing,

10. Where full directions have not been given, a supplemental bill may be brought in aid of a decree of the court of Chancery.

The supplemental and the original ought to be considered as one bill.

11. If an objection by the defendants in an original cause, for want of parties to the supplemental bill, is not made in the first instance, it is too late
to

P. 1740, cor. Hardw. C.

Standish v. Radley,

2 Eq. Abr. 173. pl. 5.

Barnard. Rep. 463. 468.

2 Atk. 177.

Vide Taylor v. Sharp, 3 P.

Wms. 371. and the cases there

referred to, *post*, f. 7.

23 June 1740, cor. Hardw. C.

Lewellin v. Mackworth,

2 Atk. 40. *Barnard.* 445.

24 Ap. 1744, cor. Hardw. C.

Dormer v. Fortescue

3 Atk. 133.

P. 1745, cor. Hardw. C.

Jones v. Jones, 3 Atk. 217.

to do it when the cause comes on again, where it was put off only for want of formal parties, in order that the decree might be complete.

It is not necessary to make the defendants in an original bill parties to a supplemental one, in the nature of a bill of revivor, nor at the hearing can those defendants object for want of parties.

3 July 1746, cor. Hardw. C.
Goodwin v. Goodwin and others,
3 Atk. 370.

12. After a cause is set down, the plaintiff can only amend by making parties, and cannot introduce new charges, or put a material fact in issue which was not so in the cause before, but he should prefer a supplemental bill in such case.

M. 1791, cor. Thurlow, C.
Hill v. Chapman, 1 Ves. jun. 405.

13. A new plaintiff, by supplemental bill, may impeach a decree upon rehearing, on petition of former parties.

See next section of Bills of Review.

Sec. 7. Of Bills of Review, and Bills in the Nature of Bills of Review.

H. 1682, Canc.
Dunne v. Filmer, 1 Vern. 135.
Vide Barbon v. Searle, 1 Vern.
417. *Pitt v. Earl of Arglais*,
1 Vern. 441.

1. A Bill having been taken *pro confesso*, a bill of review was brought, and a demurrer to it allowed; and now a new bill of review being brought, defendant demurred; for that a bill of review lies not after a bill of review. Demurrer allowed.

H. 1682, Canc.
Price v. Keyte, 1 Vern. 135.
1 Eq. Abr. 80. pl. 2.

2. In a bill of review a new supplemental bill may be added.

H. 1682, cor. North, C. S.
Williams v. Mellish, 1 Vern. 117.
1 Eq. Abr. 82. pl. 10.

3. A plaintiff is not allowed to bring a bill of review unless he first performs the decree, or swears that he is unable to do it, and surrenders himself to the Fleet till the matter be determined.

P. 1683, cor. North, C. S.
Mellish v. Williams, 1 Vern. 166.
Vide next case.

4. Upon a bill of review, the party cannot assign for error that any of the matters decreed are contrary to the proofs in the cause, but must shew some error appearing in the body of the decree, or new matter discovered since the decree.

M. 1683, Canc.
Fitton v. Lord Maxfield,
2 Freem. 38.
2 Eq. Abr. 175. pl. 8.
Not bringing in writings according to the decree, sought to be reversed, nor giving security for the costs in the bill of review,

5. In a bill of review, all things are to be performed according to the former decree that do not extinguish the right, otherwise the non-performance is a good plea in bar, as if writings are to be brought into court, or costs paid; but not to release the right,

right, or make a conveyance, because that would destroy the right.

6. It was objected against the bill of review in this case, that the errors assigned were collected from the proofs in the cause, and did not appear in the body of the decree. *Per* Lord Keeper—That was occasioned by the ill way in drawing up the decree, without particularly stating the matters of fact. His lordship said, plaintiff should not be concluded by it, unless the matter of fact were stated in the decree.

7. Plaintiff was allowed to bring a bill of review without paying the costs decreed in the original cause (a), upon making oath he was not worth 40*l*. besides the matters in question.

pretended, had been in execution almost twenty years.

The order for dispensing with costs, upon bringing a bill of review, ought to be set out in the bill.

Although there is no limitation of time for bringing a bill of review, yet after a long acquiescence under a decree (*viz.* 22 years) the court would not reverse it but upon very apparent errors.

In *Edwards v. Carroll*, 5 Bro. P. C. 460. the House of Lords determined that twenty years should bar a bill of review, because the statute of W. 3. had barred all writs of error after that period.

Vide *Smith v. Clay*, Amb. 645. but better reported in 3 Bro. Ch. Ca. 639. (n.)

8. No bill of review will lie after a bill of review, though upon the face of the decree, upon the first bill of review, there appears to be error.

9. A man cannot bring a bill of review after a demurrer allowed to a former bill of review.

Note; At law, after errors are assigned, the court will not give leave to discontinue a writ of error.

10. Where a demurrer to a bill of review is allowed, it may be inrolled; but if over-ruled, that cannot be inrolled to prevent the demurrer being re-argued.

11. A fine and non-claim was held in this case a good bar to a bill of review, as well as to an equity of redemption.

12. It was agreed by the court and bar, that the course of the court is, before any bill of review is granted, the former decree ought to be executed, if the cause of such bill be not such as to extinguish the whole right and foundation of the decree, as a release. And it is a good plea in bar of a bill of review,

was pleaded in the case of *Okeover v. Poole*, *Ibid.* 1 Eq. Abr. 82. pl. 11. S. C. but not same S. P.

H. 1684, cor. North, C. S.
Bonham v. Newcomb,
1 Vern. 214. 216.
Vide last case.

M. 1684, Canc.
Fitton v. Earl Mackelsfield,
1 Vern. 264.
1 Eq. Abr. 82. pl. 11.
(a) These costs amounted to
150*l*. for which plaintiff, as was

H. 1685, cor. North, C. S.
S. C. 2 Vern. 292, 293.
1 Eq. Abr. 175. pl. 9.

M. 1686, cor. Jefferies, C.
Barbon v. Searle,
1 Vern. 417.

H. 1687, cor. Jefferies, C.
Pitt v. Earl of Arglais,
1 Vern. 441.

H. 1690, cor. Lds. Comrs.
Woots v. Tucker, 2 Vern. 120.
1 Eq. Abr. 82. pl. 8.

M. 1690, cor. Lds. Comrs.
Lingard v. Griffin,
2 Vern. 190.

M. 1700, Canc.
Ann. 2 Eq. Abr. 175. pl. 10.
12 Mod. 343.

review, that the former decree is not executed. And it was said, that although bills of review be in nature of a writ of error, yet it is not favoured in equity; for upon a writ of error (and that only in some particular cases) one need only give bail to pay principal and costs: but in bills of review the decree ought to be actually complied with; and besides there ought to be security for costs. But a case of *Palmer and Denby* was cited; where, in the case of an executor, it was granted without examination of the decree.

8 Jan. 1707, Dom. Proc.
Watkins v. Price,
Collet's P. C. 389.
4 Vin. 414. pl. 5, 6.
2 Eq. Abr. 175. c. 12.

T. 1713, cor. Cowper, C.
Hicks v. Conyers,
2 Eq. Abr. 177. pl. 2.
7 Vin. Abr. 398. pl. 16.

It is irregular to bring a new bill to vary a decree already pronounced. A defendant in this court may bring a cross bill before any decree pronounced in the original cause, and if the original cause is heard before the cross cause, the decree in the original cause may afterwards be varied by the decree in the cross cause; but in that case the cross bill must be brought before any decree made in the original cause. By the course of the court, if the original decree had been inrolled, the now plaintiff, upon affidavit of new matter come to his knowledge since the former decree, might have a bill of review; but he cannot now be relieved against the former decree by this new bill, and rehearing the former cause; for the decree is right upon the pleadings and proof, and therefore cannot be varied upon a rehearing; and it is contrary to the course of the court to alter a decree upon an original bill exhibited after the decree pronounced. Per Lord Chancellor in S. C. *Ibid.*

H. 1719, in Scacc.
Lady Granville & al. v. Ramsden & al. Bunb. 56.

Note; Matters already settled, or which might have been put in issue in the original cause, shall never be drawn into examination upon a bill of review. 2 Eq. Abr. 176. pl. 14. (n.)

H. 1719, Dom. Proc.
Ludlow and another, Executors, v. Macartney & al.

13. On an appeal from the dismissal of a bill of review, no objection can be made to the justice of the decree, which was not assigned for error in the bill of review. Objections to the Master's report are no grounds for a bill of review. Every error assigned against a decree by a bill of review ought to appear in the record itself.

14. Defendant C. in 1712 brought a bill against the now plaintiff and M. his wife, who was the widow and executrix of B., for an account of B.'s estate, and obtained a decree: then M. died; and before the decree was inrolled, the now plaintiff petitioned for a rehearing, and at the same time preferred an original bill, suggesting new matter come to his knowledge since the decree, and obtained an order to rehear the former cause. At the rehearing of this cause, &c. plaintiff's counsel admitted that the decree in the former cause was just, upon the pleadings and proof in that cause; but insisted, that upon the pleadings in this cause the merits appeared otherwise; and therefore prayed a new decree in favour of the now plaintiff, and to set aside the former decree. Cowper, C. dismissed the bill, and affirmed the former decree.

15. A bill was brought to establish plaintiff's right of common, and to set aside several former decrees. Defendant demurred to the whole bill; for if there was any error in the former decrees, there should have been a bill of review. Demurrer allowed.

16. The negligence or forgetfulness of persons under no sort of legal incapacity, and in matters lying

lying within their own knowledge and power, is no sufficient foundation for a bill of review, it being an excuse which might serve at all times, and render suits endless.

17. A bill of review was brought and demurred to; and afterwards the plaintiff in the bill of review moved to dismiss the bill, as not being regularly filed, upon payment of costs out of the 50*l.* deposited upon the filing thereof; and the same was granted.

Chancellor declared, that by the rules of the court relating to bills of review, it is directed, that if the duty decreed be for the payment of money, then the money must be paid before any bill of review is to be admitted; though in that case if the party bringing the bill prevails, the money so paid shall be refunded to him; and this is a stronger case, the money to be paid being only for costs, which in all events ought to be paid before any bill of review is brought. 2 Bro. P. C. 24. (n.)

The plaintiff's original bill was to settle the boundaries of his manor: upon the first hearing an issue was directed, and a verdict found for the plaintiff; and afterwards the cause coming on, upon the equity reserved there was a final decree for quieting plaintiff in possession, &c. and defendant was to pay costs: then defendant moved for leave to file a bill of review, upon his solicitor's affidavit, "that certain new evidence was discovered in favour of defendant since the verdict and decree." The question was, if the defendant should have leave to file the bill without first paying the costs decreed? And per Cowper, C.—He shall not; for payment of costs ought to be performed rather than any other part of the decree. And his lordship held, that bills of review could not be filed without leave of the court, in order to prevent unreasonable delays by such bills which would be brought in all causes of consequence.

especially in this case, where the new matter discovered was in the power of the party, and it was his neglect it was not discovered sooner; and let the event of the bill be what it will, the plaintiff ought to have costs, as in case of a new trial granted upon the like grounds. Where money is decreed it must be paid before a bill of review is filed, though it must be refunded if the decree be reversed upon the bill of review; but here if the decree should be reversed, yet the costs ought not to be refunded. And his lordship thought the party himself should make an affidavit that this new matter was discovered since the decree; and that the affidavit of a solicitor is not sufficient; for the defendant himself, or some other agent of his, might be informed of this matter before; at least if the defendant by reason of his age, high station, and quality may be excused from making an affidavit of the particular matters and facts, yet at least he should have an affidavit to corroborate that of his solicitor: but this affidavit of the solicitor is not a sufficient ground for a bill of review; and therefore the defendant must take nothing by the motion. *Idem.*

18. On every bill of review the plaintiff must deposit 50*l.* in order to answer costs, but no need of the leave of the court for such bill of review, unless it be founded upon new matter; and then the leave of the court is necessary as well as the depositing 50*l.*

2 Bro. P. C. 104.
4 Vin. Abr. 409. c. 18. 414. c. 7.
2 Eq. Abr. 176. c. 14.

M. 1719, Cowper, C.
The Bishop of Durham v.
Sir Henry Lyddal,
2 Eq. Abr. 175. pl. 11.
4 Vin. Abr. 415. pl. 2. affirmed
in Parliament 2 Bro. P. C. 22.

Upon this dismissal Lord S. C. stated from a MS. report,
2 Eq. Abr. 175. pl. 13.
Vide Vin. Abr. tit. Chancery,
(Z. 3), 7 Dec. 4 Geo. 1. S. C. and
P. says on plaintiff's behalf, a
book of rules printed in 1623 was
produced, wherein there was a
rule, temp. Bacon, C. and an-
other in 1656, to the effect fol-
lowing, viz. "That no bill of
review shall be allowed till after
the decree performed in ALL
parts, unless such performance
would extinguish the party's right
or title at law," (as a convey-
ance of land, release, &c.) And
per Lord Chancellor, These old
orders are reasonable and just, and
ought to be observed to prevent
delays by bills of review, which
would be brought in all causes of
value, if they might be filed with-
out leave of the court and before
the decree performed; and payment
of costs ought to be performed, &c.

T. 1715, cor. King, C.
Anon. 2 P. Wms. 283.
Vide Bacon's Ordinances, Ord.
1. Lord Hardwicke's Order of
17 Oct. 1741, in 2 Atk. 139. (n.)
Standish v. Radley, 2 Atk. 177.
Gould v. Tancred, 2 Atk. 514.
Norris v. Le Neve, 3 Atk. 26.

H. 1726,
Rules on motion by King, C.
Anon. Gilb. Eq. Rep. 184.

1st Mar. 1726, Canc.
Ashton v. Smith,
2 *Eq. Abr.* 176. pl. 17.
4 *Vin. Abr.* 409. pl. 19.

Decreed in S. C. *Ibid.* 412.
Pl. 10. S. P.
Vide Bishop of Durham v.
Lyddal, 2 *Eq. Abr.* 175. pl. 13.

Hil. 1734, Canc.
South-Sea Company v. Burnhead,
2 *Eq. Abr.* 176. pl. 18. 4 *Vin. Abr.* 414. pl. 8.

T. 1735, cor. Talbot, C.
Taylor v. Sharp, 3 *P. Wms.* 371.
2 *Eq. Abr.* 177. pl. 19.
Vide Standish v. Radley,
2 *Atk.* 177.
Gould v. Tancred, 2 *Atk.* 533.
Norris v. Le Neve, 3 *Atk.* 27.
Wortley v. Birkhead,
3 *Atk.* 809. and 2 *Vern.* 591.

(a) For if an original bill were to be allowed, the decrees of the court would be contrary and breed confusion.

(b) For unless relief were confined to such new matter, it might be made use of as a means of oppression, and the cause would never be at rest.

29 June 1738, cor. Hardw. C.
Catterall v. Purchase,
1 *Atk.* 290.
Vide Jackson v. Francis.

23 June 1740, cor. Hardw. C.
Lewellin v. Mackworth,
2 *Atk.* 40.

29 Ap. 1741, cor. Hardw. C.
Sir T. Standish v. Radley,
2 *Atk.* 177.
Barnard. 463. 468.
2 *Eq. Abr.* 173. pl. 5.

19. Bills of review are allowed only on errors apparent in the record, or on new matter discovered since the decree: so if an original bill be brought for matters, part of which are contained in a former bill and decree, and part new or by way of supplemental bill, the court will, on a demurrer to so much as was contained in the former decree, send it to a Master to see what was and what was not in the first bill, and allow the demurrer accordingly.

20. A bill of review ought not to be brought but for manifest errors appearing on the face of the decree, or for new matters arising since the decree, of which no advantage could have been taken, without leave of the court, to bring such bill upon new matters discovered. And no bill of review lies without paying the duty.

21. Bills of review are usually upon discovery of new evidence.

22. If a decree be obtained and inrolled, so that the cause cannot be reheard, then there is no remedy but by bill of review (a), which must be on error appearing on the face of the decree, or on some new matter (b), as a release or a receipt discovered since.

23. In arguing a demurrer to a bill of review, the evidence which appears on the face of the decree can only be read; but after the demurrer is over-ruled, any evidence may be read as at a rehearing, the cause being equally open.

24. Where a decree is neither signed nor inrolled, a bill of review cannot be brought, but a supplemental bill in the nature of a bill of review may.

25. It is altogether unnecessary to oblige a man to sign and inrol a decree made against himself, in order to entitle him to bring a bill of review.

Where a decree has not been signed and inrolled, a bill in the nature of a bill of review is a proper one.

The

The discovery of new matter existing at the time of a decree, but not known till after, entitles the party to a review.

Papers in the hands of a party to a former cause discovered after publication had passed, though not produced then, may be read upon a bill of review.

26. Ordered, that no supplemental or new bill, in nature of a bill of review, grounded upon any new matter discovered or pretended to be discovered since the pronouncing of any decree of this court, in order to the reverling or varying of such decree, shall be exhibited without the special leave of the court first obtained for that purpose; and unless the party exhibiting the same do first deposit with the register of this court so much money as, together with the deposit by the rules of this court to be made, on obtaining a rehearing of the cause wherein such decree was pronounced, will make up the sum of fifty pounds, as a pledge to answer such costs and damages as shall be awarded to the adverse party, in case the court shall think fit to award any at the hearing of the cause on such supplemental or new bill.

made that order. Another reason for making that order was, that men were, at a great expence, obliged to sign and inrol; which was absurd. The rule upon strict and proper bills of review is, that the decree can be varied only upon apparent errors either on the face of it, or errors of injustice upon new matter on the real merits of the case, unless any consequential matter arises; for if there is a consequential direction, the justice of which depends entirely on the variation made, the court may vary that consequential direction in favour of justice; and that is the practice of the House of Lords, who will vary a decree in favour of a respondent in any matter consequential to the relief they give to the appellant; and it is the same on a bill in the nature of a bill of review.

27. Plaintiff was heir at law of the testator, and the question in the cause arose from the sanity or insanity of the testator at the time of making his will, on which the validity of it depended. That cause came on to be heard, and a decree for a perpetual injunction was made to stay proceedings at law. Plaintiff afterwards brought a bill in nature of a bill of review, and applied to have the original cause reheard, and the decree for the injunction reversed. The reason of his application was a discovery of new evidence to shew the insanity of testator, and this evidence consisted of letters in the custody of defendants. The question therefore was, if these letters should be admitted to be read, as new proof in this bill in the nature of a bill of review; to which many objections were made. But Lord *Hardwicke* permitted the letters to be read, because this case entirely depending on its

own

17 Oct. 1741, per *Ld. Hardw. C.*
Ord. Cur. 2 Atk. 139. n.

In *Moore v. Moore*, 2 Vef. 598. *Ld. Hardwicke* commented on this order, and gave his reasons for making it. His lordship said, that though a bill of review could not be brought upon a decree signed and inrolled for new matter in being at the making of the decree, but afterwards discovered, without leave of the court, and a deposit of 50*l.*; yet a mode has been adopted of filing supplemental bills in nature of bills of review at large, without leave or deposit, and then bringing a petition to rehear or appeal. This was growing into abuse, and many such bills were brought for vexation. To put these improper bills of review under the like restraints as the other, his lordship

M. 1741, cor. *Hardw. C.*
Montgomerie v. Attorney-General,
9 *Mod.* 365.

The following are authorities respecting new proof of matter on bills of review.

Vide Lord Bacon's Ordinances, printed in his *Law Tracts*, p. 279.
1 *Ch. Rep.* 43. and which is laid down as a maxim by the bar in
2 *Ch. Ca.* 45. *Whorewood v. Whorewood*, 1 *Eq. Abr.* 82.
pl. 1. *Hennekenius v. Jacobson*, 1 *Bro. P. C.* 432. *Richmond v. Taylor*, 2 *Eq. Abr.* 516. pl. 8.

own circumstances could not be introductory of any general rule.

23 Mar. 1742, cor. Hardw.
Bennet v. Lee, 2 Atk. 529.
Vide Bennet v. Vade, 2 Atk.
 324. of which case this is a
 branch.

28. Where parties apply for leave to bring a new bill upon new matter discovered after a decree, they must shew that it is relevant, for its being merely new matter will not entitle them to such a bill.

23 Mar. 1742, cor. Hardw. C.
Gould v. Tancred, 2 Atk. 534.

29. The leave of the court must be asked before a bill of review for *new matter* can be filed: *otherwise*, if brought to reverse a decree, upon error appearing on the face of it.

S. C. A defendant may plead the decree, and demur against opening the inrolment to a bill of review brought for error apparent; and on the plea and demurrer the court will judge whether there are grounds for opening the inrolment.

30 Oct. 1742, cor. Hardw. C.
Attorney-General v. Turner,
Montgomery v. Turner,
 Amb. 587.

30. On a bill of review, after two trials at law and a decree to establish a will; upon discovery of new matter another trial was ordered, whereupon a verdict was found for the heir at law, and the former decree was reversed.

8 Feb. 1743, cor. Hardw. C.
Norris v. Le Neve and others,
 3 Atk. 26.

31. By the established practice of the court of Chancery there are but two sorts of bills of review, one founded on *supposed error appearing in the decree itself*, the other on *new matter which must arise after the decree, or upon new proof which could not have been used at the time when the decree passed*.

But this new proof must be such as was not known either to the party or his attorney, solicitor or agent, till after publication, or at a time when by the rules of the court the party could not make use of it.

Matters coming to the knowledge of the party's attorney, solicitor, or agent, is by the clear rule of the court considered as notice to the party.

Lord Bacon's rules as to bills of review have never been departed from since the making of them, and the parties who applied in the principal case for leave to bring such a bill did not bring themselves within those rules. *Per* Lord Hardwicke.

In the present case, the persons under whom the petitioners for the bill of review claimed, were fully acquainted with the matters complained of thirty-five years ago. Such an effluxion of time, and the ancestor's knowledge of the whole transaction, had great weight with the court on such an application; for the granting of such petitions after such a lapse of time would be a great hardship on the defendants in the cross bill, who may have lost papers which they might have availed themselves of when the matter was recent.

Petition

Petition dismissed without costs. Upon appeal from this order of dismissal, the same was affirmed by the Lords in a very full House, by a great majority, after a hearing of three days.

4 Bro. P. C. 465.

32. A decree can be altered only by bill of review either for error on the face of the decree, or for new matter not known at the time of bringing the first bill.

21 Mar. 1747, cor. Hardw. C.
Gregory v. Moleworth,
3 Atk. 627.

33. A bill of review was allowed on *new matter*, since it could not have been made use of in the former cause, with a probability of its being relevant.

9 May 1750, cor. Hardw. C.
Lord Portsmouth v. Lord Effingham,
1 Ves. 430.

34. Demurrer to a bill of review, because no error on the face of the decree, and that beside there was length of time, which would prevent opening the inrolment. Demurrer over-ruled.

14 Dec. 1750, cor. Hardw. C.
Gregor v. Moleworth,
2 Ves. 109, 110.

It was desired, to save the benefit of the exception as to the length of time, but *per cur.*—Nothing can be saved on a demurrer.

Length of time is proper for a plea, but not for a demurrer, for several exceptions may take the matter out of the length of time, as infancy, coverture, &c. which the party should have the advantage of shewing, and which cannot be done if demurred to.

35. A bill of review must be on new matter to shew the right of the party existing, but that it was not known to him at the time of the decree.

3 Aug. 1754, cor. Hardw. C.
Wortley v. Birkhead, 2 Ves. 576.

36. Where a bill of review is filed for reversing a former decree, and besides specifying errors in the decree contains *original* matter, and is filed without leave, it ought not to be set aside for irregularity; for under these circumstances it should be considered as a cross bill.

12 Mar. 1755, Dom. Proc.
Houghton v. West, Widow, & al.
5 Bro. P. C. 152.

37. A decree having been made at the Rolls, which was not signed and inrolled, a bill of review was brought for matters existing before, but no petition to rehear or appeal. *Per cur.*—This is not a proper bill of review, though brought upon the foundation of the order of 17th October 1741; for though a bill of review could not be brought upon a decree signed and inrolled for new and supplemental matter in being at the time of making the decree, but discovered afterwards, without leave of the court, and making a deposit of 50*l.*,

25 June 1755, cor. Hardw. C.
Moore v. Moore, 2 Ves. 598.

yet where the decree had not been signed and inrolled, a mode had been adopted of filing supplemental bills in nature of bills of review at large, without deposit or leave of the court at all, and then bringing a petition to rehear or appeal; this was growing into abuse, and several of such bills were brought for vexation; therefore, in order to put these improper bills of review under the like restraint as the other, the order of 17th October was made. Lord Chancellor said, in this case a supplemental bill is brought in nature of a bill of review, without leave or deposit before the decree was signed and inrolled, but without any petition to rehear or appeal, which must be presented before a decree can be made.

19 Dec. 1755, cor. Hardw. C.
Patterson v. Slaughter,
Amb. 293.
1 Eq. Abr. 24.

38. Lord Bacon's rule as to bills of review has these words: "*In case such new matter come to the knowledge of the party after the decree, and could not have been made use of in the cause at the time of the decree made.*" Lord Hardwicke in this case said, these words are dark in themselves, and the construction which has been put upon them is, that the *new matter* must have come to the knowledge of the party *after publication passed*.

S. C. A bill of review is proper, on new matter discovered, to prove what is *in issue*, but not to prove a title *not in issue*. And this Lord Hardwicke said was the case with all the bills of review he had known.

22 April 1760, Dom. Proc.
Edwards v. Carrol,
5 Bro. P. C. 466.

39. In this case it was determined that twenty years should bar a bill of review, because the statute of W. 3. had barred all writs of error after that period.

10 May 1767, cor. Camden, C.
Smith v. Clay, Amb. 645.
1 Eq. Abr. 32.

40. Bill of review for error apparent will not lie after twenty years from the making the decree.

Vide Edwards v. Carrol, in
Dom. Proc. 4 Bro. P. C. 466.
Note; The same doctrine
holds in the case of a bill of rehearing.

The time runs from the decree, not from the inrolment.

28 Jan. 1768, Dom. Proc.
Harwell, Esq. v. Townsend,
Clerk, & Ux. & al.
6 Bro. P. C. 289. 306.

41. As bills of review occasion great delay and expence; they must be better grounded than upon mere irregularity in point of form, which is no sufficient reason for opening a record. There must be injustice apparent upon the face of the record, and that to a party to the suit; for neither an assignee, or devisee, can have relief by such a bill,

S. C.

S. C. Though the plaintiff in a bill of review is confined to errors upon the face of the record, and cannot go out of it, yet the defendant is at liberty to alledge every matter relevant to his defence, whether in or out of the record, by way of plea, as a release, &c. to prevent disturbing the decree, nor has he any other method of introducing it: and when pleaded, the matter alledged is sufficient to preclude the plaintiff from the review he seeks.

S. C. All the parties of the original bill must be made parties to a bill of review; it being a principle of natural justice, that none is to be affected without being heard.

42. Though a bill of review cannot in general be brought to reverse a decree after twenty years, that bar does not apply to persons having contingent interests, and then not existing, or under disabilities.

M. 1793, cor. Loughb. C.
Lytton v. Lytton,
4 Bro. Ch. Ca. 441.
Vide Smith and Clay, 3 Bro.
Ch. Ca. 639. n.

43. A petition for a rehearing, or for leave to file a bill of review, was held bad for the uncertainty, and the prayer for a rehearing in this case was irregular, as the decree was signed and inrolled.

P. 1795, in Scacc.
Woolley v. Dragg
2 Anstr. 551.

Bills original after decree, see *post*, *sect.* 13.

See also *Decree, Demurrer, Error*.

Sec. 8. Of Bills of Discovery: And herein of Relief prayed by the same Bill.

1. EQUITY will not oblige a man to discover what goods he really bought of a bankrupt after the bankruptcy, and before the commission sued out, where the party had no notice of the bankruptcy.

H. 1681, cor. Finch, C.
Abery and another v. Williams,
1 Vern. 27.

Lord Chancellor said, the law was hard with tradesmen who dealt with bankrupts before notice; and the assignees ought not to be assisted in equity in any such case.

2. Bill against a corporation to discover writings. The court ordered the clerks of the corporation, and such of the principal members as the plaintiff should think fit, to answer on oath; and that the Master should settle the oath, for the corporation having put in their answer under their common seal, would disclose nothing to their own prejudice.

H. 1682, cor. North, C. S.
Anon. 1 Vern. 117.
Vide Wych v. Meal, 3 P.
Wms. 310. *Moodamy v. Morton*, 1 Bro. Ch. Ca. 469.

T. 1682, Cane.

Anon. 1 Vern. 59.

Note; All the subsequent cases on this subject are *contra*, and the constant distinction now is, that where a bill is merely for a *discovery* no affidavit is necessary; but if the plaintiff seeks to change the jurisdiction, by praying *relief also*, then an affidavit to prove the loss must be annexed to the bill. *Vide* Godfrey v. Turner, 1 Vern. 247. Nicholson v. Pattison, 1 Vern. 310. Anon. 1 Vern. 180. Anon. Prec. in Ch. 536. Anon. 3 Atk. 17. Whitechurch v. Golding, 2 P. Wms 541. Dormer v. Fortescue, 3 Atk. 132. Wainley v. Child, 1 Vef. 344. Rootham v. Dawson, 3 Anstr. 859.

M. 1682, cor. Charleton, J.
Wright v. Blicke, 1 Vern. 106.

2 Eq. Abr. pl. 7.

Vide Dulwich College v. Johnson, 2 Vern. 49. Morgan v. Harris, 2 Bro. Ch. Ca. 121.

M. 1682, cor. Charleton, J.

Bird v. Hardwicke,

1 Eq. Abr. 76. pl. 4.

No man is bound to answer that which may subject him to a penalty or a forfeiture. See a long and special note on this subject (to Sir Basil Firebrass's case, 2 Salk. 550.) *ante*, tit. *Answer*, f. 1. pl. 1.

T. 1683, cor. North, C. S.
Barbons v. Brent, 1 Vern. 176.

T. 1683, cor. North, C. S.
Anon. 1 Vern. 180.
Vide Wainley v. Child,
1 Vef. 344. *post*, where all the
cases on this subject are collected.

M. 1683, cor. North, C. S.
Hincks v. Nelthorpe,
1 Vern. 204.

1 Eq. Abr. 40. pl. 5. 77. pl. 11.

H. 1684, Cane.
East India Company v. Evans & al.
1 Vern. 368.

H. 1684, cor. North, C. S.
Stapleton v. Sherrard,
1 Eq. Abr. 76. pl. 8.

1 Vern. 212. *Vide* Sherborne v. Clerk, 1 Vern. 273.

T. 1684, cor. North, C. S.
Godfrey v. Turner, 1 Vern. 247.
Vide post, Wainley v. Child,
1 Vef. 344.

3. Where a man brings a bill for discovery of a deed, and prays only a discovery, he must make oath he has lost the deed; but he need not make such an affidavit where he sets forth the loss of his deed, and prays relief.

Vide Godfrey v. Turner, 1 Vern. 247. Nicholson v. Pattison, 1 Vern. 310. Anon. 1 Vern. 180. Anon. Prec. in Ch. 536. Anon. 3 Atk. 17. Whitechurch v. Golding, 2 P. Wms 541. Dormer v. Fortescue, 3 Atk. 132. Wainley v. Child, 1 Vef. 344. Rootham v. Dawson, 3 Anstr. 859.

4. Bill by an administrator for a discovery of the personal estate: it is no bar to the discovery that the administration is litigated.

5. A man is not bound to answer what may subject him to the penalty of an act of parliament.

No man is bound to answer that which may subject him to a penalty or a forfeiture. See a long and special note on this subject (to Sir Basil Firebrass's case, 2 Salk. 550.) *ante*, tit. *Answer*, f. 1. pl. 1.

6. Bill for an account and discovery of receipts and acquittances after a verdict at law. Defendant demurred. *Per cur.*—After a verdict it is too late. There is no reason why the defendant should be put to answer. Demurrer allowed.

7. Where a man brings a bill for discovery of a bond, he need not make oath he has lost the bond, as he must do if he seeks relief for the duty.

8. In a bill to establish an agreement for a separate maintenance for defendant's wife, plaintiff prayed a discovery of the hard usage of the defendant towards his wife. Defendant demurred to the discovery, and the demurrer was allowed.

9. Bill of discovery will lie in equity, although for a matter that sounds in *tort*.

10. Bill to discover who is tenant of the freehold, in order to bring a *formedon*, will not lie.

11. Demurrer because defendant has not made oath of the loss of his deed. *Per cur.*—Where plaintiff prays only a discovery, he need not make such an affidavit as he must if he prays relief; for the jurisdiction cannot be translated without such an oath.

12. Bill for a discovery of the tenant to a precipe on a voluntary conveyance. Demurrer allowed.

M. 1684, cor. North, C. 3.
Sherborne v. Clark, 1 Vern. 273.
 1 Eq. Abr. 76. pl. 9.
Vide Stapleton v. Sherrard,

1 Vern. 212. where Lord Keeper said, there were ways of knowing it without a bill.

13. Demurrer; for that plaintiff had not made oath of the loss of an agreement; and defendant insisted that plaintiff had the writing, but had razed it, and so by his own act had destroyed his own remedy at law; *ergo*, he ought not to be aided in equity. *Sed non allocat. per cur.*

H. 1685, Cane.
Nicholson v. Pattison,
 1 Vern. 310.
Vide post, Walsley v. Child,
 where all the cases on this subject
 are collected,

14. Plaintiff having recovered a judgment at law for 1400*l.* against J. S., brought a bill, charging that J. S. had conveyed his estate to trustees, and had lent 1000*l.* to A. in B.'s name, and praying that it might be liable to plaintiff's debt. Defendant demurred; for that he in his lifetime was not bound to discover his personal estate, and for that the bill was in nature of a foreign attachment, which the practice of the court of Chancery did not countenance. Demurrer over-ruled.

P. 1686, cor. Jeffries, C.
Smithier v. Lewis, 1 Vern. 398.
 1 Eq. Abr. 77. pl. 13.
Vide next case.

15. A. having obtained judgment against B., brought his bill against C, for an account and discovery of the goods of B., which C. had got into his hands. Demurrer; for that plaintiff did not alledge he had sued out execution, which he ought to have done before he brought his bill. Demurrer allowed.

P. 1686, cor. Jeffries, C.
Angel v. Draper, 1 Vern. 399.
 1 Eq. Abr. 77. pl. 14.
Vide Smithier v. Lewis, ante.
Taylor v. Hill, 1 Eq. Abr. 132.
 Pl. 151

16. A. having lands contiguous to B., brought his bill, that B. might discover the boundaries of his estate as they appear by his deeds. B. is not obliged to make this discovery, and help a man to evidence to evict him.

H. 1688, Cane.
Hungerford v. Goring,
 2 Vern. 38.

17. A bill may be brought against an executor for a discovery of the personal estate of his testator before the will is proved, or during the litigation thereof in the spiritual court.

P. 1688, cor. Jeffries, C.
Dulwich College v. Johnson,
 2 Vern. 49.
 1 Eq. Abr. 77. pl. 12.

Vide Morgan v. Harris, 2 Bro. Ch. Ca. 121.
Notes; By the will, charities were devised relating to Dulwich College.

18. The *African* Company hired the defendant's ship to freight; and the defendant covenanted not to trade in any of the goods in which the Company dealt; and if he did, to pay double the value for such goods, with liberty to the Company to deduct the same out of the freight. The Company brought a bill to discover whether the defendant traded in

M. 1691, Cane.
African Company v. Parish & al.
 2 Vern. 244.

This was said to have been several times adjudged in cases of the East India Company.

M. 1692, Canc.
Conway v. Stroud, 2 Freem. 138.
2 Eq. Abr. 77. c. 3.

H. 1700, Canc.
Fane v. Atlee,
1 Eq. Abr. 77. pl. 15.

(a) *Vide* African Company v. Parish, 2 Vern. 244. where defendant is bound to discover, though subject to a penalty, having laid himself open by his own agreement.

T. 1700, Duchy Cham.
Sir Basil Firebrass's case,
2 Salk. 550.
Vide special note to this case, sub
tit. ANSWER, f. 1. pl. 1.

M. 1702, Canc.
Heathcote v. Fleet, 2 Vern. 442.
1 Eq. Abr. 76. pl. 6.

(a) 1 Eq. Abr. 76. pl. 6. ac-
cords in the fate of the demurrer,
and the next case confirms it.

M. 1703, Canc.
Morfe v. Buckworth,
2 Vern. 443.
1 Eq. Abr. 76. pl. 7.

M. 1704, cor. Wright, C. S.
Hall v. Atkinson and others,
2 Vern. 463.
1 Eq. Abr. 168. pl. 5.

To this resolution the reporter
says *quære tamen*?

any of the said goods. Though this be a penalty, yet the defendant shall discover it, for it was his own agreement.

19. Bill by a creditor against *B.* for a discovery of the estate of *Y. S.* supposed to be in his hands. *B.* demurred; because no executor or administrator was a party. Held good; for if no person will administer, a creditor may.

20. Bill to discover the assignment of a lease. Defendant pleads a proviso, that the lease should be void, if assigned; and that he ought not by discovery to subject himself to a penalty or forfeiture. Plea allowed; though the plaintiff urged, that this was not a penalty, but part of the contract (a).

21. *H.* was chief ranger of *Ensfeld Chase*; and now a bill was exhibited against him in the chancery of the duchy, for a discovery of what deer he had killed, and what timber he had cut down, and to shew cause why his patent should not be repealed. To this a prohibition was granted *nisi*, for he shall not be obliged to answer upon oath what may make him forfeit his place: it ought to be proved against him.

22. Bill to discover who was the owner of a wharf or lighter, to enable the plaintiff to bring an action for the damage his goods had sustained by the neglect of the lighterman. Defendant demurred, and (the note (a) says) the demurrer was over-ruled.

23. Bill to discover the part-owners of a ship, to enable one of the freighters that suffered by neglect of the master (in suffering the ship to take fire) to bring his action. Defendant demurred. Demurrer over-ruled.

24. Bill for discovery whether in a mortgage which had been assigned to the defendant, there was not some trust declared for the benefit of the plaintiff. Defendant by answer denied there was any such trust. The answer being replied to, the question at the hearing was, whether the defendant should be obliged to produce the deed? The court would not compel him so to do, for by this method all purchasers may be blown up.

25. Plaintiff

25. Plaintiff having recovered judgment against *J. S.*, (but had not issued execution) supposing some particular effects of *J. S.* to be in defendant's hands, brought a bill to discover them, in order to subject them to his judgment. Defendant demurs for want of equity, since no such bill would lie against the debtor himself, much less against a third person. *C. S.* seemed to agree it would not lie against the debtor, nor against a third person for a general discovery, but only for particular things, as in this case. Demurrer overruled.

26. Plaintiff is not entitled to a discovery in equity without verifying his title at law.

1713, Canc.
Duke of Hamilton v. Fleetwood,
2 *Eq. Abr.* 377. pl. 2. 8 *Vin. Abr.* 538. pl. 7.

27. Persons claiming lands by a will, or other voluntary disposition, and having the law on their side, are entitled, as against an heir at law, to the assistance of a court of equity for a discovery of the deeds and writings relating to the devised estate, and to have them delivered up as following the lands, otherwise the heir might defend himself at law by setting up prior incumbrances, and thereby hinder the trying the validity of the will.

19 May 1713, Dom. Proc.
*Duchess of Newcastle v. Lord
Pelham & al.*
1 *Bro. P. C.* 397.
8 *Vin. Abr.* 551. c. 12.
2 *Eq. Abr.* 377. c. 3.

28. A bill lies for discovery of treasure trove, but the plaintiff cannot have relief upon it, for he might bring his action of trover. Bill dismissed with costs.

M. 1717, in Scacc.
Dr. Stane v. Heathfield,
Bunb. 18.

29. A bill for the discovery of the consideration of a promissory note for 275*l.*, suggesting that it was given *ex turpi causa*, to smother and make up a felony, &c. Demurrer to that part of the bill which seeks a discovery if the note was not given to make up a felony, it being of a criminal nature, &c. Demurrer allowed.

M. 1718, Canc.
Guiborn v. Fellows & al.
2 *Eq. Abr.* 377. pl. 4.
8 *Vin. Abr.* 543. pl. 6.

30. Bill against an executor to discover assets, and pray relief, the court will grant relief, but it seems the defendant should join in commission; if he had demurred to the relief it would have been good.

M. 1718, in Scacc.
Thomas v. Williams, *Bunb.* 29.
Vide Dupins v. Duke of Kingston.

that where an executor or administrator confesses a liquidated debt, there discovery should draw relief, *aliter non*.

In *Alpot & al. v. Thompson & al.*
5 May 1726, Gilbert, C. B. declared the solid distinction to be,

31. An affidavit must be annexed to a bill for the discovery and establishing of deeds only, that the plaintiff had not the original deeds, &c.; but if relief be prayed, an affidavit is not necessary.

T. 1719, in Scacc.
Johnson v. Elhker,
Bunb. 46.

H. 1720, in Scacc.
Afgill v. Dawson, Bunb. 70.

32. Plea to the discovery and relief in a bill, when the bill prayed only a discovery; plea over-ruled.

T. 1720, Canc.
Ason. Prec. in Ch. 536.
Vide Walmesley v. Child,
1 Ves. 344. *post*, where the
cases on this subject are collected.

33. When a bill is exhibited for a general discovery of deeds, it is not necessary for the plaintiff to annex the usual affidavit that he had them not in his custody.

M. 1721, in Canc.
East India Company v. Atkins,
1 Com. Rep. 346.
1 Stra. 168.

34. A man may waive a privilege, though he is not obliged to discover what will subject him to a penalty.

There was an appeal afterwards to the Lords; but the matter was compromised.
Vide Mos. 74. Bird v. Hardwicke, 1 Vern. 109. East India Company v. Sandys, 1 Vern. 128.
African Company v. Parish, 2 Vern. 244. Hardr. 137. Smith v. Read, 2 Eq. Abr. 378. pl. 10.
626. pl. 27. 1 Atk. 526.

6 Feb. 1723, Canc.
Andrews v. Powers or Powis,
2 Eq. Abr. 377. pl. 6.
8 Vin. Abr. 548. pl. 9.

35. Will concerning personal estate proved in the spiritual court; the respondent having a former will in his favour, brings his bill to discover by what means the latter will was obtained, and to have an account of the personal estate, and whether the testator was not incapable, and imposed upon. The defendant *demurred*, because *it belonged to the spiritual court only to prove the validity of wills*, and the former will was not proved in the spiritual court, as the will in his favour was. Demurrer over-ruled.

M. 1726, cor. King, C.
Richardson v. Mitchell,
Sel. Ca. in Ch. 51.
2 Eq. Abr. 378. pl. 8.
Vide Edwards v. Freeman, Sel.
Ca. in Ch. 51. in which cases it
is said, that where defendant an-
swers, he must answer fully.

36. A bill brought to set aside a purchase, and to have a discovery of the scite and profits of the estate. The defendant by answer insists that he is a purchaser, and that he is not obliged to make a discovery; to which exception was taken for not answering, and *allowed*.

M. 1725, Canc.
Floyer v. Sydenham, 9 Mod. 99.
Sel. Ca. in Ch. 2.
2 Eq. Abr. 377. pl. 7.
2 Ch. Ca. 4.
Vide 1 Eq. Abr. 36.
2 Com. Dig. Ch. (3 l. 3).

37. Bill by one of the coheirs of A., claiming a moiety of an estate under the settlement of his grandfather, against which claim defendant set up the will of A. in his favour, and insisted he was not obliged to produce the settlement until the will was set aside. *Per cur.*—This is a dispute between coheirs, and the plaintiff can have no better right to see the deed after the will is set aside than now. Decreed the deeds to be brought into court, and plaintiff to have his costs.

H. 1726, Scacc.
Galcoyne v. Sidwell & al.
Gillb. Eq. Rep. 187.
2 Eq. Abr. 72. c. 19.

38. Bill by the executor and devisee of A. to have an account of bullion, goods, and effects put into partnership with, and sent by defendants to Africa, and to have an account of the profits. *Per cur.*—There is no pretence to have a discovery, yet the

the plea (a) which tends to support doing wrong must have the greatest strictness and exactness. The plea however was disallowed, and defendants were ordered to answer; for when two go on in an unlawful trade, they waive that unlawfulness as between themselves.

Note; The chief distinction upon the rule, that discovery should draw with it relief, seems to be, that where a discovery is prayed and a liquidated debt admitted by the answer, the court might then proceed to give relief; but where the debt is unliquidated, being uncertain and sounding in damages, it is proper for a jury to ascertain it, there being nothing for a court of equity to found a determination upon. *Per* Gilbert, C. B. *Ibid.* The case of *Dupins v. Duke of Kingston* was cited for plaintiff, which was a bill brought by a millener against the duke, as administrator of his son, for a discovery of assets, and to have a debt which was due to her from the son discharged; in which case it was laid down as a rule, that discovery should draw with it relief: to which Hale, B. said, he thought this cited case should have gone no further than a discovery, and after that should have proceeded to law. *Ibid.* Bill against an executor to discover, and praying relief. Relief granted. But defendant might have demurred to the relief. *Bunb.* 29. Where an executor or administrator confesses a liquidated debt, there discovery shall draw relief; *aliter non.* *Ibid.* Bill for discovery and relief, suggesting that defendants broke into the intestate's room (who died suddenly) and took away ninety-nine broad pieces, &c. Dismissed with costs, as proper at law: the equity of the bill being denied. *Ibid.* 287.

39. Bill to discover whether defendant's husband died worth 40*l.*, so as to be able to pay plaintiff a mortuary, and for relief. Upon answer, admitting assets, but denying the custom, plaintiff went into a proof of his right, and several witnesses were examined on both sides. Bill dismissed at the hearing, with costs, as to the relief, plaintiff's remedy being at law, or in the spiritual court; and in a bill against one person only, the right could not be established. The dismissal was generally with costs, though defendant had not demurred to the relief, but run into a proof of the right,

M. 1727, in *Scacc.*
Torrent v. Burley, 2 *Sira.* 715.
2 *Burn. Eccl. Law*, 519.

40. Defendant being appointed supercargo of a ship belonging to plaintiffs, entered into a security-bond not to trade contrary to contract, or to the statute of 9 *Anne.* Bill to discover if he had so traded. Defendant pleaded the said statute, and that he would be otherwise liable to forfeitures, notwithstanding in his agreement with plaintiffs he had covenanted not to plead or demur to any discovery they might require. Plea over-ruled.

M. 1728, *Canc.*
South-Sea Company v. Bimsted,
1 *Eq. Abr.* 78. pl. 16.
Note; Plaintiffs in this case
waived the penalty of the security-
bond.

41. A mortgagor brings a bill to redeem, on payment of what is due, and a decree is made accordingly. Pending the account the mortgagee dies, and a supplemental bill is filed against his administratrix for a discovery of assets. The administratrix demurred, and her demurrer was allowed, because the plaintiff (as appeared by the bill and decree) could have no demands out of them.

M. 1728, cor. *King, C.*
Welsh v. Fyfe, *Mof.* 38.
Vide *Lord Stowell v. Cole*,
2 *Vern.* 219. *Lady Stowell v.*
Cole, 2 *Vern.* 296.

M. 1728, cor. King, C.
Rorty v. Pemberton, Mos. 58.

42. One partner files a bill against another partner abroad, to discover (*int. al.*) what consignments he had made to others in *England*. Defendant by his answer submits, that by what he had set out plaintiff had broke the articles, and makes no discovery. This is insufficient; for if the question should be determined for the plaintiff, he is entitled to a discovery, which he would lose if defendant should die in the mean time.

T. 1729, cor. King, C.
Whitcomb v. Golding,
 2 P. Wms. 541.
 1 Eq. Abr. 14. pl. 4.

43. In a bill purely for the discovery of a deed, or to have it delivered up, there is no need of annexing an affidavit that the deed is lost. *Secus*, if relief be prayed generally, as to recover the money on a bond.

T. 1729, cor. M. R.
Anon. Mos. 185.
Vide *Walmley v. Child*, 2 Ves.
 444. *post*, where all the cases on
 this subject are collected.

44. If a cause comes to a hearing where the bill is for a discovery only, it must be struck out of the paper, and a decree cannot be made for the plaintiff; or the bill must be dismissed, because it prays no relief; for the words of a dismissal are, "the court seeing no cause to relieve," &c.

M. 1729, cor. King, C.
Worthington v. Wilkinson,
 Mos. 244.
Vide Nelf. Rep. 14. 266. fo. edit.

45. A plaintiff after six years is entitled to a discovery of a fraud.

S. C. A fraud is a bar at law to the statute of limitations.

10 Feb. 1730, Dom. Proc.
Radcliffe v. Fursman,
 3 Bro. P. C. 538.

It appears from the arguments in this case, that the plaintiff was entitled to the discovery he prayed. — Plaintiff sought to know whether certain *stole* bonds which defendant held as trustee were satisfied or not?

46. In a bill brought for payment of a legacy, &c. the defendant was charged with having admitted the facts on which the plaintiff's right was founded, in some case stated by him for the opinion of counsel; and therefore the defendant was required to set forth the case *verbatim et literatim*. Defendant demurred, for that the plaintiff was not entitled to any such discovery, and that the opinion was taken for the defendant's own private use and satisfaction. But this demurrer was over-ruled.

M. 1732, cor. King, C.
North v. Earl and Countess of
Strafford,
 3 P. Wms. 148, 9.
 2 Eq. Abr. 80. pl. 7.

47. A bill is brought by a lord of a manor to recover a fine for a copyhold, on a suggestion that the defendant was admitted by attorney, but sometimes pretends the attorney had no authority to make such admittance. The defendant answers as to part, but demurs as to relief (a). Demurrer allowed.

(a) Lord Chancellor said, he had not known this case before of a demurrer as to relief. Had there been no demurrer, the court on the hearing would have relieved; but here the defendant has not demurred to the discovery but to relief only. So that upon allowing the demurrer plaintiff was at liberty, if he should think the defendant had not answered the whole bill, to except as to any part, or might amend his

his bill and enforce defendant to discover his lady's admittance. Plaintiff might proceed and make proclamations to oblige defendant's lady to come in and be admitted, and had at law a better relief for his copyhold fine and arrears of quit-rent than equity could give him, for he might distrain or bring debt for the arrears due to him as executor, and distrain for the arrears incurred since his father's death. *Vide Holder v. Charabury*, 3 P. Wms. 256. And with regard to the fine, Lord Chancellor said, the lady either had been admitted or had not. If she had, plaintiff might bring debt or an *indeb. assump.* for the fine, provided it was a reasonable one; and if she has not been admitted, plaintiff might cause proclamations to be made, and on default after three proclamations might seize the copyhold as forfeited. Wherefore his lordship allowed the demurrer as to relief only. Reg. Lib. B. 1732. fol. 19.

S. C. The lord brings a bill against a tenant to recover a quit-rent, alledging that the land out of which the quit-rent issues, by reason of the unity of possession with other land, is not known. Defendant answers as to discovery, and demurs as to relief (b). Demurrer allowed.

(b) *Note*: With respect to the copyhold fine, plaintiff might bring his action at law for it, and need not, as it should seem in his declaration, set forth the particulars of the land held of him by the defendants by copy of court-roll, only that the defendant's wife held certain lands within his manor, &c. But as to the quit-rents, it seems the plaintiff must either in his action or avowry shew the particular lands; and in case the defendants in their answer set forth that they do not know where the said lands lie or what they are, plaintiff is entitled to a commission to set them out, and then the plaintiff being entitled to this relief, *quære* whether the defendant's demurrer to all relief be good? *Vide Cox v. Foley*, 1 Vern. 359. *Duke of Bridgewater v. Edwards*, 4 Bro. P. C. 139. *Benton v. Baldwin*, 1 Atk. 598. *Duke of Leeds v. Powell*, 1 Vef. 171. *Duke of Leeds v. Radnor Corporation*, 2 Bro. Ch. Ca. 318. 518.

48. Bill against baron and feme to discover if the feme married with consent. The baron submitted to answer, but the feme did not. *Per cur.*—The feme is not bound to answer this bill which subjects her to a forfeiture.

H. 1733, cor. Talbot, C.

Wrottesley v. Bendish,

3 P. Wms. 236.

2 Eq. Abr. 537. pl. 16.

Note: In this case there was a devise over, and hence the forfeiture. *Vide also Chauncey v. Tahourden*, *post*, pl. 66.

49. An information is filed by the Attorney-General against A. and B. for a discovery of the place of their birth, charging them to be aliens. The defendants demur: 1st, That the king's title to the estate, if any, was merely at law, without any circumstance or ingredient to entitle him to the assistance of a court of equity. 2d, That the defendants were not bound to betray their own title, and therefore the king was not entitled to the discovery prayed. Demurrer over-ruled.

12 Ap. 1733, Dom. Proc.

Legb v. Earl of Warrington and others, 4 Bro. P. C. 91.

An alien cannot demur to an information for discovery of the place of his birth in order to establish the fact of alienage. *Attorney-General v. Rose, Park*, 144. *Dupleffs v. Attorney-General*, 1 Vef. 286. 5 Bro. P. C. 91.

50. The known method of recovering estates held by aliens, for the benefit of the crown, is by a commission under the great seal, to inquire into the facts; and on the inquest finding them, to seize the estate into the king's hands. And in order to prove these facts, the king has the same right to a discovery by the assistance of a court of equity as the subject has, and founded on the same principle of justice, *viz.* that it is in general against conscience for any one to enjoy the property of another by concealing his right.

26 Ap. 1733, Dom. Proc.

Lady Laneborough v. Morgan,
Eq. 4 Bro. P. C. 97.

T. 1735, cor. Talbot, C.
Sharp v. Carter and another,
 3 P. Wms. 374.

51. Bill to discover if any and what monies were paid or advanced by defendant on account of certain suits in the bill mentioned, and for carrying on the same. Demurrer as to the discovery, for that might tend to charge defendant with maintenance, contrary to the statute. Plaintiff also by the same bill charged defendant with contracting to purchase pretended (or controverted) rights, to which defendant pleaded the statute of 32 H. 8. c. 9. s. 2. against the sale of pretended rights. Lord Chancellor over-ruled the demurrer, as the charge in the bill did not amount to maintenance, but he allowed the plea.

19 Mar. 1736, cor. Hardw. C.
Smith v. Read,
 2 Eq. Abr. 379. pl. 10.
 8 Vin. Abr. 540. pl. 21.
Vide Jones v. Meredith, 2 Eq.
 Abr. 380. pl. 12.

52. Bill to discover whether defendant was a papist. Defendant claimed under another person, who was a suspected papist. Defendant pleaded (*inter alia*) 11 & 12 W. 3. c. 4. whereby as a papist she would have been disabled. *Per cur.*—As the party under whom defendant claimed could not have been obliged to make the discovery, so neither shall the defendant. Plea allowed.

P. 1736, in Seacc.
Allport v. Thomas,
 2 Eq. Abr. 171. pl. 2.
 Gibb, Eq. Rep. 127.

53. J. S. who had furnished necessary tackling for a ship which was afterwards sold, by bill prays a discovery of the personal estate of one of the part-owners who was dead, and to have relief against his executor and the surviving part-owner. *Per Gilbert, C. B.*—Though this case is within the mercantile law, yet it being admitted by the answer that the charge was for tackling, &c. this court must grant the same redress as a court of Admiralty would, viz. upon the bottom of the ship; and it would be very hard to send the plaintiff back again, there to obtain relief. That all the part-owners ought to make satisfaction, having received the profits of the voyage, which the ship was able to perform by the plaintiff's furnishing the tackling, &c. And *per Hale, B.*—The proceedings here are very proper; for in the court of Admiralty seamen's wages are recoverable, and they are also chargeable upon the bottom of the ship; and yet *Chancery retains bills for them (a)*.

(a) It is a rule that equity has a concurrent jurisdiction with the court of Admiralty.

8 Feb. 1737, cor. Hardw. C.
Duncalf v. Blake, 1 Atk. 52.

54. Bill by an insurer to discover whether wool was not shipped on board defendant's ship. Plea, the several statutes which make it penal to export wool. Plea allowed in bar.

23 Jan. 1738, cor. Hardw. C.
Woodcock v. King, 1 Atk. 286.

55. Where a bill is merely for a discovery, the court will not on motion dismiss it for want of prosecution,

prosecution, but defendant must pray an order on the plaintiff to pay the costs of the suit, to be taxed by a Master.

56. One *Farr* gave *Mary Atkins* a bond in the penalty of 1000*l.*, on condition that if he did not marry her within twelve months after date, he would pay her 500*l.* Soon after, under pretence of reading it, he took it against her consent, and carried it away with him; whereupon she brought a bill for the delivery of the old bond, or if cancelled, that he might execute a new one. *Mary Atkins* dying intestate, her mother, who as her administratrix was entitled to the 500*l.*, revived against the defendant *Farr*. The plaintiff's equity, said the court, was the bond's being gone by the default of the defendant, and therefore the plaintiff is entitled not only to a discovery, but to relief by payment of the money; and *Farr* was accordingly decreed to pay what was due for the principal sum of 500*l.* in the condition of the bond, with interest for the same at the rate of 4*l. per cent.* from the day of filing the original bill.

57. The court of Chancery will not admit a bill of discovery in aid of the jurisdiction of the ecclesiastical court, because they are capable of coming at that discovery themselves.

58. Bill to discover whether defendants, who were children of a papist, were not educated in the *Romish* religion, and whether they had conformed and taken the oaths when of a proper age so to do. Plea, the statute of 11 & 12 *W. 3. c. 4.* and that the discovery would subject them to the disabilities of that act. Plea allowed.

59. By the ancient course of the court, a person was allowed to bring his action at law against the representative of the deceased, and at the same time to bring his bill in Chancery, in order to have a discovery of assets; though now it is established, that if the party proceeds in equity against such representative, his bill must be both for a discovery of assets and a satisfaction for his debt. In the present case, the representative having sought to give a preference to others by confessing judgments, Lord Chancellor distinguished it from the ordinary rule, and gave plaintiff leave to make a special election

Vide Walmsley v. Child,
1 Ves. 344. & *post.*

28 Feb. 1738, cor. Hardw. C.
Atkins v. Farr, 1 Atk. 287.
2 Eq. Abr. 247. pl. 32.
15 Vin. Abr. 296. pl. 3.

24 Nov. 1738, cor. Hardw. C.
Dun & al. v. Coates & al.
1 Atk. 288.
2 Eq. Abr. 78. pl. 11. 629. pl. 1.
8 Vin. Abr. 537. pl. 9.
2 Eq. Abr. 379. pl. 11.
3 Vin. Abr. 540. pl. 9. *nomine Dunx v. Balguy*, S. C. & P.

P. 1739, Scacc.
Jones & Ux. v. Meredith,
2 Eq. Abr. 380. pl. 12.
Vide Smith and Read,
3 Vin. Abr. 540. pl. 21.

29 Jan. 1740, cor. Hardw. C.
Barker v. Dumaresque,
Barn. Rep. in Ch. 278.
2 Atk. Rep. 119.
2 Eq. Abr. 380. pl. 13.

election to recover judgment at law, with a *cessat executio*, and likewise to proceed in equity for a discovery and account of assets.

H. 1740, cor. Hardw. C.
Geerish v. Donaccon,
Barn. Rep. in Ch. 428.
2 Atk. 166.

2 Eq. Abr. 12. pl. 10.
In Atk. this case is called *Geerish v. Donovan*, and is said to be determined 14 April 1741.

(a) Lord Hardwicke's doubt was, whether the practice of the court would allow of it, the bill for a discovery having been dismissed.

Circa, 1740, Canc.
Sangeja v. East India Company,
2 Eq. Abr. 170. pl. 28.

16 Mar. 1740, cor. Hardw. C.
Abraham v. Dodgson,
2 Atk. 157.

P. 1740, cor. Hardw. C.
Lowball v. Tonkins,
2 Eq. Abr. 380. pl. 14.
Barnard. 39.

60. *A.* by bill prays *relief*, and a *discovery* against *B.*, and proceeds against him at law on same account; *B.* prays that *A.* may make his election in which court he would proceed; *A.* elects to proceed at law, but had leave to proceed in equity so far as he sought a *discovery*; *A.* amended his bill on payment of costs, and struck out his prayer for relief; thereupon the bill was dismissed of course, because it only prayed a discovery, and *B.*'s costs taxed at 38*l.* *A.* got a judgment at law for 440*l.*, and took *B.* in execution; *B.* sued out an attachment against *A.* for the 38*l.* costs; *A.* petitioned that he might deduct the 38*l.* out of the 440*l.* Lord Chancellor seemed inclined to grant it (a), if any precedent could be found, and directed it to stand over, that plaintiff might search for precedents.

61. To a bill for relief, all persons necessary to the relief must be made parties, or defendant may plead to such a bill. *Secus*, where a discovery only is wanted.

62. Bill for a discovery. Defendant answered to part, and demurred to part. Lord Chancellor said, it was absurd to answer a discovery, and then demur. Defendant may answer to a discovery, and demur to relief, but that is a different case. Demurrer over-ruled.

63. Plaintiff and defendant were joint securities for *J. S.*, who was cashier to the commissioners of hawkers and pedlars. *J. S.* absconded. Plaintiff was threatened with an extent, whereupon he paid a considerable sum of money, and then sued defendant to judgment and execution for his proportion. Defendant, to elude the execution, secreted great part of his goods, to discover which plaintiff brought his bill; and plaintiff also prayed a discovery of what incumbrances there were on such of defendant's lands, as plaintiff had seized on an *elegit*. To the discovery of the goods secreted, defendant pleaded the return, and filing of the writ of execution, and also a *liberate* which had been sued out, whereby plaintiff's remedy was gone; and as to the incumbrances on the estate, defendant demurred in law. *Per cur.*—The demurrer must be

over-ruled, for a tenant by *elegit* has a right to a discovery of the incumbrances on the estate, in order to bring an ejectment under the *liberate*. An ejectment is necessary to get into possession, and a tenant by *elegit* is entitled to hold *quousque* he has satisfaction. The difficulty in this case arises upon the plea, which is really a new point; but Lord Chancellor allowed the plea, saying, it would be of no use to go on as to that part of his case which was covered by the plea. If he will be benefited by a discovery of the goods either at law or in equity, he certainly may come into equity for relief; but if not, he is not entitled to a discovery.

The authorities cited in support of this plea were 3 Cro. 310. 1 Lev. 92. and on the other side 1 Vern. 40, 41. 398.

64. The statute of limitations cannot be pleaded to the discovery when the debt was due, though it may to the debt itself, because by the defendant's setting forth when the debt commenced, it will appear to the court whether the six years are incurred according to the statute.

31 July 1740, cor. Hardw. C. *Mackworth v. Clifton*, 2 Atk. 51.

65. A demurrer to a bill for the discovery of the facts contained in a case which the defendant had stated to his own council for an opinion, overruled.

29 Oct. 1741, cor. Hardw. C. *Sir William Stanhope v. Roberts, Executor*, 2 Atk. 214.

Note; This point is only cited by Lord Hardwicke in *Stanhope v. Roberts*, and appears to be the case of *Radcliffe v. Furman*, reported in 3 Bro. P. C. 538. ante.

66. An executor brought a bill for discovery of defendant's marriage, who demurs, for that if she was to discover what is asked, it would amount to a forfeiture of her legacy, which was given to her on condition. Lord Hardwicke allowed the demurrer, as defendant cannot answer without shewing that she married without consent.

4 Aug. 1742, cor. Hardw. C. *Chauncey v. Tabourden*, 2 Atk. 392.

Vide *Chancey v. Fenhoulet*, which, if not S. C., is exactly in point. 29 April 1757, reported 2 Ves. 265.

Vide *Wrottesley v. Bendish*, ante, pl. 48.

S. C. On a bill to set aside an usurious contract, a defendant may demur to the discovery of what interest he agreed to take, for that he cannot set forth without disclosing the very interest he has taken.

Lord Hardwicke said, he had known a bill brought in Chancery and also in Scacc. for discovery of waste, and a demurrer was allowed in both courts, because the plaintiff had not waived the penalty.

67. A demurrer will lie to a bill brought which seeks a discovery of the defendant, whether a particular person is living, or where he is, in order only to make him party to a suit.

4 Aug. 1742, cor. Hardw. C. *Dinely v. Dinely*, 2 Atk. 394.

68. A bill was brought by a principal to discover what goods the defendant had bought of his agent. He demurred, for that he is not obliged to set out what gain he has made by the retail of them;

4 Aug. 1742, cor. Hardw. C. *Liffitt v. Reave*, 2 Atk. 395.

them; but the demurrer was held to be insufficient, and over-ruled.

4 Aug. 1742, cor Hardw. C.
Baker v. Pritchard, 2 Atk. 387.

69. The defendant demurred to the discovery sought with relation to perjury in a suit at law, charged to be committed by defendant's procurement; and likewise to the discovery sought respecting certain proceedings before the delegates. Lord *Hardwicke* held, that the sentence in the delegates could not be read, as the demand in this case was for *real* estate; and his lordship observed, that the ecclesiastical court not only proceed by different laws, but in matters relative to the *personal* estate only. Demurrer allowed as to this part; and with regard to the perjury charged to be committed, Lord Chancellor said, a demurrer cannot be good for part, and bad for part; his lordship therefore allowed that part of the demurrer also as to the discovery sought in relation to the subornation of perjury.

17 Dec. 1743, cor Hardw. C.
Anon 3 Atk. 17.
Vide Walmley v. Child, *post*.

70. Bill for a discovery of title-deeds, and for relief also. Demurrer, for want of an affidavit that plaintiff had not the deeds in his custody; allowed upon the constant course of the court.

28 April 1744, cor Hardw. C.
Dormer v. Fortescue, 3 Atk. 132.
Vide Walmley v. Child, *post*,
where the cases on this subject are
collected.

71. Where a bill is merely for discovery of a deed, or for producing it upon a trial at law, no affidavit is necessary; otherwise, where the plaintiff wants to change the jurisdiction from a court of law to a court of equity, for then an affidavit must be filed; and this is the constant distinction.

Dec. 1744, cor. Hardw. C.
Honeywood v. Selwyn,
3 Atk. 276.
(a) 12 & 13 W. 3.

72. Bill to discover whether a person does not hold an office in trust for defendant, which would vacate defendant's seat in parliament (a). Defendant insisted by his answer, that he was not obliged to make the discovery, but he would not demur, because that would be to admit the facts stated in the bill to be true. *Per cur.*—Defendant is not obliged to make this discovery, neither can he be compelled to say whether the place was held in trust for him during a former parliament.

15 May 1745, cor. Hardw. C.
Hildyard v. Cressy, 3 Atk. 303.

73. The original bill prays a discovery only, the amended bill prays relief. The answer to this is to be considered as a part of the answer to the original bill, as much as if engrossed on the same parchment, and a part of the same record.

74. Where

74. Where a plaintiff at law has facts within his own knowledge unknown to the defendant, and the defendant submits to try the case at law first, when he might by a bill of discovery in equity have come at the facts from the plaintiff's answer before the trial, the court will not always relieve against a verdict.

The cases in which equity will relieve against verdicts are, where the plaintiff knew the fact to be different to what the jury found, and where the defendant was ignorant of it at the trial.

The present was a bill for relief against a verdict at law. Defendant in equity pleaded his verdict, and judgment at law in bar. Plea allowed.

26 June 1745, cor. Hardw. C.
Williams v. Lee, 3 Atk. 224.

75. Bill to discover a second marriage, upon which an estate was limited over from defendant. Defendant demurred to the discovery, but the demurrer was over-ruled, such limitation being conditional, and not considered by the court as a forfeiture: besides, defendant did not shew she had performed the condition, and therefore she could not demur.

6 Aug. 1745, cor. Hardw. C.
Lucas v. Evans, 3 Atk. 266.

75. In a bill for a discovery, and for perpetuating the testimony of witnesses, the plaintiff prayed the defendant might abide such order and decree as the court should think proper to make. A demurrer to such a bill was allowed, for it is praying relief as well as a discovery.

3 Mar. 1746, cor. Hardw. C.
Rose v. Gannel, 3 Atk. 439.

76. Bill to discover whether defendant, after institution, &c. to A., was not presented and instituted to two other livings. Defendant demurred, because such discovery would tend to shew the avoidance of A. Demurrer allowed, for defendant is not obliged to discover what may subject him to a forfeiture, or any thing in that nature.

24 Mar. 1746, cor. Hardw. C.
Boteler v. Marmaduke and another,
3 Atk. 457.

S. C. In a bill to stay waste, the plaintiff is not entitled to a discovery, unless he waives the double penalty.

S. C. Upon the popish acts the plaintiff is not entitled to a discovery, because these acts create an incapacity, which has the same effect with a forfeiture: nor is this incapacity wholly removed by 18 Geo. 3. c. 60. (a)

(a) Mitf. Ch. Plead. 162. (a.)

78. Where a bill is brought for a discovery of concealments of a bankrupt's estate, the court will not allow the defendants to look into their depositions

H. 1747, cor. Hardw. C.
Boden and others, Assignees, v. Dellow and others,
1 Atk. 289.

sitions taken by the commissioners before they put in their answers.

9 June 1749, cor. Hardw. C.
Metcalf v. Hervey,
1 Ves. 248.

79. Demurrer generally to the whole bill, as well to discovery as to relief, if plaintiff is entitled to a discovery, the demurrer being entire must be over-ruled.

A bill lies to discover the title of a person bringing an ejectment, and to see if that title is not in some other person.

21 Dec. 1749, cor. Hardw. C.
Walmsley v. Child, 1 Ves. 344.

80. *C. W.* lodged money at a banker's shop in 1742, for which he took the banker's notes, payable to himself or bearer. In nine days he went to the shop, and said he had lost the notes, and stopped payment of them; at the same time desired to have his money, as the notes were not negotiated but only lost. The bankers were willing to pay the money upon the usual indemnity, but that was never given. Seven years after *C. W.* died; his widow took out administration, and insisted on payment of the money, which the bankers refusing, she brought her bill, but neither offered an indemnity nor made affidavit of the loss of the notes, presuming that from the length of time the total loss of them must be taken for granted. Defendants by their answer again offered payment on being indemnified. The cause was heard on the bill and answer. *Per cur.*—There are cases upon which a man may come into equity upon a loss, though the remedy may be at law. One is clear upon a bill for a discovery, but if the bill is for relief as well as a discovery upon the foundation of a loss, that changes the jurisdiction^(a); and there are but three cases in which that can be done, in all of which an affidavit to prove the loss must be annexed to the bill. 1st, If a deed or instrument upon which a demand arises be lost, and the party comes for a discovery only, he is entitled thereto without affidavit; but if he pray relief beyond that discovery, and to have payment of the debt, an affidavit of the loss must be annexed, for that changes the jurisdiction. If the deed lost concerns the title of lands, and possession be prayed, the like affidavit must be annexed. 2dly, Another case is that of a personal demand, where there is loss of a bond, and a bill is filed in equity on that loss to be paid the demand: there discovery will not be sufficient, for it must be to be paid the money thereon; but an affidavit must be annexed.

The

(a) Where a man brings a bill only for discovery of a lost deed, he must make affidavit of the loss; *secus*, where he sets forth the loss of his deed and prays relief, for then no such affidavit is necessary. *Vide Anon.* 1 Vern. 59. but all the subsequent cases are *contra*, and the constant distinction now is, that where a bill is merely for a discovery, no affidavit is necessary; but if the plaintiff seeks to change the jurisdiction by praying relief also, then an affidavit to prove the loss must be filed with the bill.

Vide Godfrey v. Turner,
1 Vern. 247.

Nicholson v. Pattison,
1 Vern. 310.

Anon. 1 Vern. 180.

Anon. Prec. in Ch. 536.

The reason of the difference between a bond and note is, that at law a proferit *in cur.* of the bond itself must be made, otherwise oyer cannot be demanded by defendant; and if oyer be not given, the plaintiff cannot proceed. But no proferit is necessary in the case of notes, the proving the contents being sufficient, and nothing standing in the plaintiff's way. 3dly, Another case in which a party may come into equity on a loss, is, to pray satisfaction and payment of it upon terms of giving security. At law the plaintiff might offer, but the defendant could not be compelled to take: in equity, it would be a consideration, whether the offer were reasonable. Thus was the case of *Terefy v. Gory*, *Finch's Rep.* 301. where a bill of exchange on defendant was indorsed to plaintiff, and by him lost or mislaid, as appeared by the affidavit annexed; and the bill prayed that the defendant might be decreed to pay plaintiff the money as last indorsee, on plaintiff's giving security to save the defendant harmless against all previous indorsements, which was so decreed, but without costs. In that case, could the plaintiff have proved the contents of the bill at law, the indorsements and the loss of it, he might have brought his action there, without going into equity: but he was apprehensive the course of trade might stand in his way at law, and therefore went into equity upon terms, submitting it to the court whether they were not reasonable. So was the case of *Glynn v. The Bank of England**, the plaintiff submitting to give security, which was what a court of law could not take into consideration. The bill in the present case is to have a decree for a plain legal demand (b), opposing the giving security without an affidavit of the loss of the notes; and without any evidence besides presumption from length of time. It may be said, that the rule of equity for annexing an affidavit to a bill is in case of the loss of a deed; and that in general is so: but an affidavit should be also required in the case of any instrument, where the party comes into equity to change the jurisdiction; and the ground is the same in the case of a lost note. In *Terefy v. Gory* the bill was so brought, and an affidavit was annexed, though security was offered (c). That the present is a legal demand is clear, notwithstanding the loss of the note, and perhaps the easiest remedy is at law, for the plaintiff may go two ways to work: if she

Anon. 3 Atk. 17.
 Dormer v. Fortescue, 3 Atk. 132.
 Rootham v. Dawson,
 3 Anstr. 859.
 Whitchurch v. Golding,
 2 P. Wms. 541.
 Woodcock v. King,
 1 Atk. 286.

* 2 Vef. 38.

(b) Plaintiff contended that the accident of loss gave an equitable jurisdiction.

(c) Lord Nottingham laid great stress on this circumstance.

(d) Defendants by their answer offered to pay the money on the usual indemnity; but plaintiff insisted they had no right to demand a security on so plain a case.

(e) *Clark v. Martin*, Pottet v. Pearson, 1 Salk. 129.

can prove the loss, she may declare on the notes; but to get rid of that proof, she may bring an *indebitatus assumpsit* for money had and received, &c. for payment into the defendant's shop is admitted (d). The statute of 3 & 4 Ann. arose from some determinations (e) in the beginning of her reign by Holt, C. J. (that no action could be maintained on a promissory note,) and from those determinations arose that act, as appears by the recital, but nothing in that statute forbids that an *indebitatus assumpsit* may be brought, and the note given in evidence, or proved if lost; nor does any thing stand in the way, as in the case of a bond. Then supposing an action for the money, which is admitted to be paid in the shop, it will be for the consideration of the court how far the course of trade ought to stand in plaintiff's way. As to the act relating to inland bills of exchange, it should be taken notice of. Before the stat. 9 & 10 W. 3. there was great difficulty in recovering on such bills. This matter being therefore uncertain, the merchants procured that act; the nature of the provision of which being, that if an inland bill of exchange, payable to A., and not indorsed, be lost, and A. comes to the person drawing, he is not bound to pay, without security given, in case the bill be found: and yet what danger could there be in general? For if a bill is payable to A., and A. makes affidavit and shews the loss, and the bill is never indorsed, there is little danger; because it is common among merchants to draw several bills, viz. *pay the second, first not paid*; which is a security, and the constant course with merchants. Then consider the intent of 3 & 4 Ann. relating to promissory notes: the title of the act is to give the same remedy, and to make these notes of the same effect as inland bills of exchange. And this practice of the Bank and the Goldsmiths has taken rise from the provision made in that act; for it is equally dangerous for them to pay without having the promissory note delivered up, as in the case of inland bills of exchange. Lord Chancellor said, if he was to act by his own discretion, he could see no ground to depart from that: the present is not a case in which there is a probability of great hazard; nor did his lordship think the defendant, if it was not for the precedent, would lay so great weight upon it; for from the length of time it is natural to think there is no risk. But if there is any,

any, the court ought not to let the defendant run it. And there is a suspicious part of the case from what *C. W.* said and did.

Upon the whole, therefore, the plaintiff must bring an action at law for the money; the bill shall be retained; and then the matter will be properly tried, and a court of law will take into consideration how far the course of trade and the manner of negotiating these notes are to go. It is now established, that if a goldsmith's note is taken and kept beyond three days, and the goldsmith breaks, it is the party's own fault for keeping it longer, though there is no act of parliament concerning that: this therefore is as proper to be determined by a jury as that was.

It was doubted on behalf of plaintiff whether she could maintain an action, and that therefore an issue ought to have been directed, so as to clear the case of all collateral matter. But Lord *Hardwicke* said, he saw no doubt of maintaining the action; nor was there any thing in the answer that would bar it. But if plaintiff did not proceed in the action for the money, let the bill be dismissed with costs.

81. One who is merely a witness cannot be made a defendant for discovery of what he is examinable to, unless he is interested; but where a bill for a discovery is brought, as in this case, he ought to plead thereto, and support it by an answer disclaiming interest, and not to demur.

22 Mar. 1750, cor. Hardw. C.
Plummer v. May, 1 *Ves.* 426.

82. Bill to discover whether defendant was tenant for life. Defendant pleaded that the discovery would subject him to a forfeiture, he having made a lease for the life of another, which would be a discontinuance of any remainder over, and the remainder-man might enter for that forfeiture. Plea allowed.

14 Dec. 1750, cor. Hardw. C.
Weaver v. Earl of Meath,
2 *Ves.* 108.

83. Bill to discover whether defendant was lawfully married to testator, and whether she had not issue by him. Defendant pleaded, that the discovery might subject her to ecclesiastical penalties. Plea allowed.

20 Mar. 1751, cor. Hardw. C.
Brownsword v. Edwards,
2 *Ves.* 243.

84. Though equity will not compel a discovery of usury, or a forgery, it will not create a defence, but direct a trial.

20 Mar. 1751, cor. Hardw. C.
Edwards v. Edwards,
2 *Ves.* 246.

85. Bill for discovery of a marriage, by which, if without consent, a portion is given over, Defendant

29 April 1751, cor. Hardw. C.
Chancey v. Fenbourn,
2 *Ves.* 265.

Vide Chancey v. Tahourden, cor. Lord Hardw. 4 Aug. 1742, (2 Atk. 392.) which if not S. C. is S. P.

(a) The reporter does not say whether Lord Chancellor allowed this demurrer, but the compiler presumes he did, as in *casu* Chancery v. Tahourden.

ant demurred. Lord Chancellor thought this an extreme hard demand upon defendant's own discovery. When the continuance of an estate is only during widowhood, it is no more than a conditional limitation; but this makes a forfeiture of that which would be otherwise in the defendant. As to the discovery being the marriage and not of the consent, that is only in words, for the bill charges the marriage to be without consent (a).

31 July 1751, cor. Hardw. C. *Harrison & Ux. v. Southcote and another*, 1 Atk. 528.

Vide Smith v. Read, 8 Vin. Abr. 540. pl. 21.

Vide note to Bishop of London v. Fytche, *post*, pl. 96.

86. The bill seeks a discovery from defendant *Moreland*, whether one *Southcote* was not a person professing the popish religion before he conveyed the freehold and copyhold estates to the defendant in the bill mentioned as a purchaser thereof. Plea, the statute of 11 & 12 W. 3. for preventing the growth of popery, so far as it goes to the discovery whether *Southcote* was a papist, *allowed*.

S. C. A devisee from a papist which by reason of the penal law would affect him, from the incapacity in the deviser to devise, is not compelled to discover whether the deviser was a papist.

S. C. The rule of law is, that a man shall not be obliged to discover what *may* subject him to a penalty, not what *must* only.

S. C. Every heir at law has a right to inquire by what means and under what deed he is disinherited, and a plea therefore to such a discovery will not be allowed.

31 July 1751, cor. Hardw. C. *Lord Montague v. Dudman*, 3 Vef. 398.

87. A bill of discovery lies in aid of some proceedings in Chancery or at law as to a *civil* right, but not upon indictment or information, nor by a lord for discovery of the goods and chattels of his tenant, and satisfaction of his heriot.

23 July 1752, cor. Hardw. C. *Chetwynd v. Linden*, 2 Vef. 450.

88. Bill to discover a conspiracy, or attempt to set up a child, which defendant pretended to have by a person who kept her, and was desirous to have a child by her. Defendant demurred to such part of the bill as sought to discover the conspiracy. Demurrer over-ruled.

24 Oct. 1752, cor. Hardw. C. *Finch v. Finch*, 2 Vef. 492, 3.

* *Secus*, upon an information at the suit of the crown. *Vide* Duplessis v. Attorney-General, 5 Bro. P. C. 191. 2 Vef. 286. *Attorney-General v. Rose*, Park. 244.

89. Bill to discover whether defendant has a *legitimate* son; this he must answer; but a man is not bound to answer that which may subject him to ecclesiastical penalties, nor whether he is married, nor whether he is an alien*; neither will the court compel a discovery to create evidence for a *future* cause.

90. A bill is not of course by a son against his father for discovery of a settlement, but he must shew a reason for preferring it.

24 Nov. 1752, cor. Hardw. C.
Lord Lempster v. Lord Pomfret,
Ambl. 154. 1 *Eq. Abr.* 78.
Vide *Packington v. Packington*.

91. Plaintiff who was disinherited brought his bill to have inspection of deeds and writings, and there appearing to be no title in the plaintiff, defendant moved that the bill should be dismissed with costs. *Per* Lord Chancellor refused, for if an heir at law brings a bill for a discovery, there is no pretence that he shall pay costs. Bill dismissed without costs.

27 Jan. 1753, cor. Hardw. C.
Lemaq v. Alie,
1 *Eq. Abr.* 125.
Ambl. 163.
Vide *Shales v. Barrington*,
1 P. Wms. 431.

92. Bill by way of information to discover if plaintiff was an alien, having lands in his possession. Defendant demurred to the discovery. Demurrer over-ruled in the Exchequer, and affirmed in parliament.

13 Mar. 1753, Dom. Proc.
Attorney-General v. Duplessis,
5 Bro. P. C. 91.
2 *Vesf.* 286.
Vide *Attorney-General v. Rose*,
Park. 144.

93. The rule of discovery in equity by answer (unless subjecting to penalty) depends not on the rule of law. Equity will grant a discovery on a dispute between the lord of one manor and the lord of another.

3 July 1755, cor. Hardw. C.
Anon. 2 *Vesf.* 621.

94. Bill by the lord of a manor, claiming a prescriptive right to certain tolls for goods landed at plaintiff's quay, and praying a discovery of the goods so landed by defendant. Defendant denied plaintiff's title, and refused to discover. *Per cur.*—Defendant is not compelled to discover till plaintiff has established his right at law. *Aliter*, where the title is in equity.

12 July 1763, cor. Henley, C.
Northleigh v. Luscombe,
1 *Eq. Abr.* 78.
Ambl. 612.

95. Where a man by his own agreement subjects himself to a payment in nature of a penalty, if he does a particular act, a demurrer to the discovery of that act will not hold. Thus where a lessee covenanted not to dig loam, clay, sand, or gravel, except for the purpose of building on the demised land, proviso to pay 20 s. *per* load, and defendant afterwards dug great quantities. Upon a bill to discover the quantities, (waiving the possible forfeiture of the demised term,) defendant demurred, for that the discovery might subject him to a penalty. Demurrer over-ruled.

H. 1779, Canc.
Richards v. Cole,
Brodrepp v. Cole,
Misf. Cb. Plead. 159.

96. Upon a *quare impedit* brought against the plaintiff he filed the present bill, to discover whether the clerk presented to him by defendant had not given a general bond of resignation, in order that

T. 1781, cor. Thurlow, C.
Bishop of London v. Fytche,
1 Bro. Cb. Ca. 96.
1 *Eq. Abr.* 78.
Note: The court over-ruled this demurrer, upon a clear opi-

tion that the resignation-bond given by the incumbent was not simoniacal (a), conceiving that a discovery might be material to support the bishop's defence at law to a *quare impedit*, upon the ground that the bond put the clerk under the power of the patron in derogation of the rights of the ordinary. Lord Chancellor thought, in this case, the defendant had not sufficiently shewn himself liable to penalties to refuse a discovery; and there is no instance of the courts having refused a discovery only because it was inconvenient to the party making it; and it is for the plaintiff, who pays the costs of the application, to consider how far the discovery is material to him or not. As to the demurrer for immateriality, Lord Chancellor said it was the first instance of the kind; if the matter in the bill was frivolous the court might interfere. His lordship thought the plaintiff entitled to the discovery, and that it would remain with another court to determine its materiality.

(a) The principal question in this cause coming on in the court of C. B. in H. 1782, it was determined there in favour of the patron, *that general bonds of resignation are legal, and are not a justification to the bishop in refusing to admit the clerk*, which judgment was affirmed in error in *cur. B. R.* (4 Term Rep. 81, 82.) A writ of error was then brought in parliament, where, after a long debate, the judgment was reversed.—See a full report of what passed in the Lords in *Cunningh. Law of Simony*, 52.

8 July 1785, cor. M. R. abf. C.
Moodalay v. Morton & East India Company,

1 Bro. Ch. Rep. 468.

1 Eq. Abr. 76.

Defendant Morton, as secretary to the East India Company, was not held bound to discover any thing prejudicial to the company.—*Vide Walpole v. White*, S. P.

97. A bill will lie against the East India Company for a commission to examine witnesses in India, and for a discovery by what authority plaintiff was dispossessed of a lease granted him for supplying Madras with tobacco, the plaintiff intending to bring an action. Demurrer to the bill over-ruled.

5 Mar. 1788, cor. Thurlow, C.

Price v. James,

2 Bro. Ch. Ca. 319.

Bill for a discovery and relief where plaintiff was entitled to relief only. Defendant demurred generally. Objected, that the demurrer should have been to relief only. *Per* Lord Chancellor—It is incumbent on the plaintiff to shape his bill according to what he has a right to pray. General demurrer allowed.

M. 1789, cor. Thurlow, C.

Ford v. Peering,

1 Ves. jun. 72.

98. Upon a bill by an heir at law for discovering and delivering up, or depositing, title-deeds against persons in possession of them as executors, and in possession of the premises by agreement with a tenant by the curtesy, plaintiff need not state every link of his pedigree.

H. 1792, cor. Thurlow, C.

Hodgson v. Dand,

3 Bro. Ch. Ca. 475.

99. Bill for a discovery may be dismissed with costs, from the coming in of the answer, where that answer contains a good defence; for plaintiff having obtained a discovery, ought not to go on.

P. 1792, in Scacc.

Bowman & al v. Lygon & al.

1 Anst. 1.

100. The tertenant cannot file a bill to discover the title of the rector in possession, in order to avoid paying tithes, where the title is not otherwise in issue.

S. C. But if the title is in issue in the original suit for tithes, he may have such discovery by

a cross

a cross bill, without setting up any counter title.

101. A bill for discovery of money won at play on stat. 9 *Ann. c. 24.* will not lie at the suit of a common informer till he has commenced some suit for relief.

P. 1792, in Scacc.
Mynd v. Francis, 1 *Anstr.* 5.

102. Where a bill seeks a discovery of matter which the defendant is not obliged to answer, he must take advantage of it by demurrer.

T. 1792, cor. Lda. Comrs.
Selby v. Selby,
4 *Bro. Ch. Ca.* 11.

103. Bill for tithes praying a discovery, whether the defendants had not associated together in their defence. Demurrer to the discovery was allowed; for if the combination was not criminal, the discovery was impertinent; and if it was, defendants would subject themselves to penalties by the discovery.

M. 1792, in Scacc.
Oliver, Clerk, v. Haywood and others,
1 *Anstr.* 32.

104. The bill prayed a discovery, whether the defendant had not contributed to the expence of a suit to try a general question against the plaintiffs. Defendant demurred; for that a discovery might criminate him. It appeared, that by the course of the suit no general right could be bound. Demurrer allowed.

H. 1793, in Scacc.
Corporation of London v. Ainsley,
1 *Anstr.* 158.

105. Bill for a discovery in aid of an action of covenant. Plea; a clause in articles of copartnership, that any dispute should be referred to arbitration. Plea over-ruled, discovery being of course where an action is brought and can be maintained.

1 May 1793, cor. Loughb. C.
Mitchell v. Harris,
2 *Ves. jun.* 129.

106. Bill for a discovery of glebe mixed with defendant's lands by his ancestors, who occupied both. Answer, describing the glebe-lands, from certain papers in the defendant's possession. Motion to produce them. Ordered; for defendant is bound to elucidate plaintiff's claim, where the confusion arose from the acts of his ancestor.

T. 1793, in Scacc.
Potts v. Adair,
1 *Anstr.* 259.

107. Where a bill prayed discovery and relief, the plaintiff being entitled to discovery only, a general demurrer was allowed.

M. 1793, cor. Loughb. C.
Collis v. Swayne,
4 *Bro. Ch. Ca.* 480.

In support of the demurrer were cited *Price v. James*, 2 *Bro. Ch. Ca.* 319. *Measter v. Branston*, cited 2 *Bro. Ch. Ca.* 282. *Charles v. Taylum*, in Scacc. July 1792, where this was considered as the established practice, and so to have been since *Price v. James*.

108. A debtor of a bankrupt, sued at law by the assignees, filed a bill for a discovery, whether they

M. 1794, in Scacc.
Selby v. Crew, 2 *Anstr.* 504.

they had not signed his certificate on consideration of his giving evidence in the action. Demurrer to the bill allowed.

T. 1795, cor. Loughb. C.

Clarks v. Capron,

2 *Ves. jun.* 666.

This case stood over (on the Chancellor's doubt of the jurisdiction) to search for precedents, but none could be found, of a bill to ascertain a debt after an order of dividend. *Bromley v. Goodere*, 1 Atk. 76. was cited for the plaintiff; but Lord Chancellor thought the present bill quite new in such a case, and that it would wholly defeat the summary proceeding under commissions, so that no distribution or length of time would prevent a suit.

109. After judgment by default in an action upon a dividend under a commission of bankruptcy, the assignees filed a bill for a discovery, and to have the proof of the debt expunged. Demurrer allowed, the course being by petition.

M. 1795, cor. Loughb. C.

Laker v. Rolle,

3 *Ves. jun.* 4.

Note; Lord Chancellor said, upon the face of the bill plaintiff's remedy by ejectment is clear. Plaintiff is entitled to a discovery of the farms and the tenants names, but not in equity to possession and an account. If plaintiff had sought for a discovery only he must have paid for it, but he seeks relief also, though his remedy is by ejectment.

110. Plaintiff by bill charged, that defendants had got the title-deeds of his estate, together with the possession, and had confounded the boundaries; and prayed a discovery, possession, and an account; to which defendants demurred generally. Demurrer allowed.

26 Dec. 1795, cor. Loughb. C.

Lake v. Thomas,

3 *Ves. jun.* 17.

111. Bill against the devisee of mortgaged premises by the heir of mortgagor, for a discovery and redemption, charging acknowledgments that the estate was held in mortgage, and that accounts had been kept. Plea of possession for fifty years under conveyances from the mortgagee. Ordered to stand for an answer, and the benefit of the plea saved to the hearing.

P. 1796, in Scacc.

Mutloe v. Smith,

2 *Anst.* 709.

112. After twenty years possession, and a descent cast, the heir at law of a former owner filed a bill for discovery of the title of the occupant, suggesting that defendant claimed under a pretended devise from his ancestor. Defendant demurred; and the demurrer was allowed.

22 July 1796, cor. Loughb. C.

Strode v. Blackburne,

3 *Ves. jun.* 222.

113. Bill by a tenant for life in possession for a discovery and delivery of the title-deeds. Plea, a mortgage in fee by a former tenant for life, alledging himself to be seised in fee without notice. Ordered to stand for an answer, with liberty to except.

A mortgagee of the unsettled part of an estate must discover the boundaries, and the title-deeds are incident to the possession under the freehold title.

A pawnee of a bailee must discover so as to enable the owner to bring an action.

114. In

114. In a bill of discovery to support an action brought by a common informer for money won at play, contrary to *stat. 9 Ann.*, it is sufficient to shew from the facts that an action lies on the statute, without stating the nature of the action brought.

H. 1797, in *Seacc.*
Cowan v. Phillips & al.
3 *Anst.* 343.

115. A bill for discovery of the contents of a lost deed, and to have a new one executed, must be accompanied by an affidavit of the loss of the former.

H. 1797, in *Seacc.*
Rootham & al. v. Dawson & al.
3 *Anst.* 859.
Vide Walmsley v. Child, 1 *Ves.*

344. *ante*, where the cases on this subject are collected in a note.

116. Plaintiff by his bill stated generally, that under some deeds in the custody of the defendants he was entitled to some interest in some estates in their possession, and prayed a discovery and delivery of the title-deeds, possession of the estates, and an account. Demurrer to the whole bill allowed.

20, 22 Mar. 1797, cor. M. R.
abl. C.

Ryves v. Ryves,
3 *Ves. jun.* 343.

Vide East India Company v. Herbert, cor. Thurlow, C. East India Company against Hinchman, 1 *Ves. jun.* 287. *Fry v. Penn*, 2 Bro. Ch. Ca. 280. *Renison v. Ashby*, 2 *Ves. jun.* 459. *Loker v. Rolle*, 3 *Ves. jun.* 4.

and the cases there cited, *Brandon v. Sands*, 2 *Ves. jun.* 514.

117. Bill for a discovery, whether the plaintiffs were not employed by one of the defendants (a peer) as solicitors to present and prosecute a petition on behalf of the other defendant, complaining of a return of a member of parliament, and praying that he might be declared duly elected. Defendants demurred generally. Demurrer allowed on grounds of public policy, and because the discovery could have no effect; and principally, because such transaction would amount to maintenance at common law.

7 Aug. 1797, cor. Loughb. C.
Wallis v. Duke of Portland,
3 *Ves. jun.* 494.

See *Answer, Demurrer, Plea.*

Sec. 9. Of Bills *Quia timet.*

1. IF *A.* is bound for *B.*, and has a counter bond from *B.*, and the money is become payable on the original bond, equity will compel *B.* to pay the debt, though *A.* is not sued; for it is unreasonable a man should always have such a cloud hang over him.

M. 1683, cor. North, C. S.
Lord Ranelagh v. Hayes,
1 *Vern.* 190.
1 *Eq. Abr.* 79. pl. 5.

2. Bill for a commission to examine witnesses in *perpetuam rei memoriam* (in establishment of plaintiff's right and filhery), suggesting that defendant pretended a sole right, and threatened to bring actions, and disturb plaintiff when all plaintiff's witnesses should be dead,

T. 1720, Canc.
Duke of Dorset v. Serjeant Girdler,
Prec. in Ch. 531.
2 *Eq. Abr.* 181. pl. 2.
Note; Upon arguing the demurrer in this case a difference was taken and agreed to by the

court, that if one who was out of *dead*. Defendant demurred; for that plaintiff had possession had brought such a bill, a demurrer would have been good; because he ought first to have established his title at law. If the defendant in this case *had actually disturbed* the plaintiff by fishing daily, defendant ought to have pleaded it; and that therefore plaintiff ought to have sought his remedy at law; or if the plaintiff had shewn in his bill that the defendant *had actually disturbed* him by fishing, then the demurrer had been proper; but not for *barely threatening*.
Vide Wynn v. Hatty, cor. Wright, C. S. (cited in S. C. where a bill was brought of the same nature touching a common, and the demurrer was allowed; because it appeared, upon plaintiff's own shewing, that he was interrupted and dispossessed, and therefore had his remedy at law.—*Vide also* 1 Roll. Abr. 383. *Pawlet v. Ingres*, 1 Vern. 308. *Mayor of York v. Pilkington*, 1 Atk. 282, 283. 2 Atk. 301. *Whitchurch v. Hide*, 2 Atk. 392.

H. 1729, cor. King, C.
Lord Falmouth v. Innys,
 Mos. 89.

Vide How v. Tenants of Bromsgrove, 1 Vern. 22. *New Elm Hospital v. Andover Corporation*, 1 Vern. 266. *Pawlet v. Ingres*, 1 Vern. 308. *Gell v. Rogers*, 1 Vern. 441.

M. 1730, cor. King, C.
Shirley & al. v. Earl Ferrers,
 3 P. Wms. 77.
 Mos. 389.

(a) *Sic Pearson v. Ward*, in Canc. 28 Feb. 1785. *Brydges v. Hatch*, in Canc. 19 Jan. 1788. *Hankin v. Middleditch*, 2 Bro. Ch. Rep. 641. *Lord Cholmondely v. Earl of Oxford*, 4 Bro. Ch. Rep. 157.

(b) *Vide Philips v. Carew*, 1 P. Wms. 117.

Note; Upon the trial of the principal case at the bar in B. R. the deed was found to be forged upon the evidence given by this witness.

3. A bill may be brought to be quieted in the enjoyment of a mine or colliery, before the right is established at law, for fear the mine should be ruined in the mean time; and a proper remedy can be had in no other court.

4. Bill to perpetuate the testimony of a witness for fear he should die during a long vacation. An affidavit was made that the matter lay in the privacy of the witness only (a), and was of great importance. Lord Chancellor ordered the witnesses under these circumstances to be examined, *de bene esse*, to preserve his testimony; but that if he were living at the time of the trial, then that he should be produced (b).

Where an executor is bound to find immediate security for a legacy payable at a future day, see *Executor, Legacy*.

Sec. 10. Of Bills to establish a Custom or be quieted in the Possession of a Right, and to examine Witnesses in *perpetuam rei memoriam*; And herein of Bills of Peace to prevent a Multiplicity of Suits.

M. 1681, cor. Finch, C.
How v. Tenants of Bromsgrove,
 1 Vern. 22.
 1 Eg. Abr. 79. pl. 1.
 Cary, 3.

1. UPON a motion for a new trial after verdicts upon two issues, which were directed, one to try whether a lord of a manor had a grant of free warren; and the other, in case he had the grant, whether there was sufficient common left for the tenants. Lord Chancellor said, that those matters were properly triable at law; but it being urged that

§ 10. Of Peace, and to perpetuate Testimony.

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that the bill was to prevent a multiplicity of suits, and was in nature of a bill of peace, a new trial was granted, upon payment of full costs; though Lord Chancellor doubted the jurisdiction of the court in this case.

2. A bill will not lie in a lunatic's lifetime, to perpetuate the testimony of witnesses to his will made before his lunacy.

M. 1682, cor. Charleton, J. *Ch.C.*
Sackville v. Ayleworth,
1 Vern. 105.
1 Eq. Abr. 234, pl. 3.

3. To a bill brought to examine witnesses in *perpetuam rei memoriam* to prove a *modus decimandi*, defendant demurred; for that the bill was to establish a custom against the church, and in prejudice of tithes that are due *de communi jure*. Demurrer over-ruled, the object of the bill being only to preserve testimony.

T. 1683, cor. North, C. S.
Somerzett v. Forberby,
1 Vern. 185.
1 Eq. Abr. 234, pl. 5.
Note; The reporter doubts if such a bill to establish a *modus* will lie.

4. Bill by the tenants of a manor to establish their right to the profits of a fair. Lord Keeper thought the bill very proper as a bill of peace, and to prevent a multiplicity of suits; but the bill praying only special relief, *viz.* to be quieted in possession till the right was tried at law, and not having prayed relief in the premises, or a perpetual injunction, Lord Keeper thought the bill not proper for a decree, and directed plaintiffs to amend their bill in that particular.

M. 1684, cor. North, C. S.
New Elm Hospital v. Andover,
1 Vern. 266.
1 Eq. Abr. 79, pl. 2.

5. Bill to examine witnesses in *perpetuam rei memoriam* in establishment of a right of common, before the party has established his right at law. *Per cur.*—Such a bill is not to be admitted in equity. A commoner ought not to go into equity to prove his right of common, until he has recovered at law in affirmance of his right: but if the bill had been, that one commoner had recovered small damages against the plaintiff (in equity) for oppressing the common, and therefore that the other commoner might recover the like damages, to prevent charges at law; that would have been a bill of peace, and proper in equity.

H. 1685, cor. Guildford, C. S.
Parolet v. Ingres,
1 Vern. 308.
1 Eq. Abr. 103, pl. 2.

6. Upon a bill to perpetuate the testimony of witnesses touching a right to a way, the plaintiff must set out the way exactly in his bill *per et trans* as he ought to do in a declaration at law.

H. 1685, cor. Guildford, C. S.
Gell v. Hayward,
1 Vern. 312.
1 Eq. Abr. 103, pl. 1. (2.)

S. C. But such a bill ought not to be brought for such trivial things as right of common, or for ways or watercourses, or at least not till after a recovery at law.

H. 1686, cor. Jeffries, C.
Beckinall v. Arnold,
 1 Vern. 354.
 1 Eq. Abr. 234. pl. 6. 333. pl. 2.

H. 1686, cor. Jeffries, C.
Parry v. Rogers, 1 Vern. 441.

T. 1690, cor. Lds. Comrs.
Hutcheon & al. v. Sedgwick & al.
 2 Vern. 159.
 1 Eq. Abr. 323. pl. 5. 332. pl. 8.

P. 1691, cor. Lds. Comrs.
Baker v. Child, 2 Vern. 226.
 1 Eq. Abr. 75. pl. 6.

12 Jan. 1697, Dom. Proc.
Dolphin & Ux. v. Haynes,
Sbaw. P. C. 17.
 1 Eq. Abr. 79. pl. 3.

M. 1699, Canc.
Jay & al. v. Braine,
 1 Eq. Abr. 135. pl. 4.

7. A devisee shall not examine witnesses *in perpetuam rei memoriam* to prove a will against a purchaser without notice, till the will has been established by a verdict at law.

8. Bill to examine witnesses to preserve their testimony touching the title of certain lands. Defendant demurred, because there was nothing that hindered the plaintiff from trying his title at law, and that he had not obtained any verdict in affirmation of his pretended title. Demurrer allowed.

9. The court will not give leave to examine witnesses to perpetuate testimony in case of a purchase of a reversion, where there can be no trial at law during the estate for life.

10. A bill will not lie to quiet a man in possession of a pew in a church, though the plaintiff had a decree before the ordinary for this pew. Bill dismissed with costs.

11. *A.* an infant having been placed by her guardian under the care of *C. S.*, with directions that she might be provided with what money she wanted; the infant had two sums of *C. S.* which her guardian did not know of. After she became of age an account was settled between the guardian and ward, and releases given, but these two sums were omitted in the account. *C. S.* then preferred his bill for such two sums against *A.* and her husband. Decreed, that the money so received by *A.* should be restored, for *C. S.* had a fair claim against *A.* and her husband to avoid a circuitry of suits, otherwise it would only be turning *C. S.* on the guardian, and the guardian on *A.* and her husband in equity to set aside the release, and have an allowance of these two sums. Decree affirmed in parliament.

12. A decree was obtained in *Scacc.* against two of the inhabitants of *B.* to establish a custom for all the inhabitants to grind at the king's mills. This decree was had without trial, and was affirmed in the Lords, and now a bill was brought in Chancery by other inhabitants of *B.* to prevent a multiplicity of suits, and to examine witnesses *in perpetuam rei memoriam*, and to discover evidences in defendant's hands, denying the custom, and alledging collusion in obtaining the former decree, &c.

Defendants

Defendants plead the former decree and affirmance in *Dom. Proc.* and demurred to the bill, but did not deny the collusion. Held, that the tenor of the bill was to question the justice of the former decree, and that the charge of collusion need not be answered, it being only inserted to give the court jurisdiction. The plaintiff's redress must be in the House of Peers.

13. Bill for a perpetual injunction to stay defendant from bringing any more ejectments at law, having already brought five, in all of which plaintiff had a verdict. Plaintiff also prayed that his title might rest in perpetual peace. Lord Keeper said this case was in its nature new, and did not fall under the general notion of a bill of peace, for it was only between A. and B., and one man is able to contend with another. His lordship said, that although he was convinced of the vexation of the case, the grievance was in the law, which it was the proper business of parliament to reform. His Honor therefore denied the injunction; but on appeal afterwards to the Lords, the injunction was granted.

14. Bill to discover a title to land, for an account of the profits, and to perpetuate testimony. Defendant answered as to the title, and demurred as to perpetuating evidence, in regard that plaintiff might bring his ejectment, and examine his witnesses at the trial (a). Upon affidavit that the plaintiff's witnesses were infirm and unable to travel, the demurrer was over-ruled (b).

15. A bill to be quieted in the possession of an ancient ferry used with a rope over the river Ware, was brought against twenty defendants, (who had cut the rope,) to avoid the multiplicity of actions. *Per Parker, C.*—Plaintiff may have trespass for cutting the rope: a ferry is in nature of a highway, and a bill does not lie to be quieted in possession of an highway. A bill lies to be quieted in the possession of common, but that is of a different nature: this is a navigable river, and the rope to the ferry is an obstruction to the navigation: if plaintiff has any such right, there is a proper remedy for him at law. Bill dismissed with costs.

16. Bill for a commission to examine witnesses in perpetuum rei memoriam, (in establishment of his right of fishery,) suggesting that defendant pretended

T. 1706, cor. Cowper, C. S.
Earl of Bath v. Sherwin,
Prec. in Ch. 261.
Gilb. Eq. Rep. 3.
4 Vin. Abr. 426. pl. 43.
14 Vin. Abr. 431. pl. 6.
2 Eq. Abr. 171. pl. 1.
243. pl. 11. 522. pl. 1.
1 Bro. P. C. 266.

Lord Keeper said, this case was very different from that of a lord of a manor, who might have to contend with his several tenants against the distinct rights of each; if his own title was not quieted by a bill of peace, after it was once established at law, he might be surrounded with a multiplicity of suits.

H. 1709, cor. Cowper, C.
Philips v. Carrow,
1 P. Wms. 117.
2 Eq. Abr. 13. pl. 3.
159. pl. 2. 180. pl. 1.
(a) Vide Parry v. Rogers,
1 Vern. 441. Duke of Dorset
v. Girdler, Prec. in Ch. 531.
Brandlyn v. Ord, 1 Atk. 571.
(b) Vide Shirley v. Earl of Ferrers, 3 P. Wms. 77.

E. 1714, cor. Parker, C.
Hilton v. Lord Scarborough & al.
2 Eq. Abr. 171. pl. 2.
4 Vin. Abr. 425. pl. 35.

T. 1720, Cane.
Duke of Dorset v. Sergeant Girdler,
Prec. in Ch. 531.
2 Eq. Abr. 181. pl. 2.

See this case and notes, *ante*,
2. 9.

tended a sole right, and threatened to bring actions and disturb plaintiff when all plaintiff's witnesses should be dead. Defendant demurred; for that plaintiff had not verified his title at law. Demurrer over-ruled; for plaintiff being in possession, it became unnecessary to establish his title at law.

T. 1720, Cane.

Bush v. Western,

Proc. in Ch. 530.

2 *Eq. Abr.* 522, pl. 3.

The court of Chancery will not grant an injunction unless the party's right is established at law.

Vide 2 *Ch. Ca.* 165. *Anon.* 1 *Vern.* 120. *East India Company v. Sandys*, 1 *Vern.* 127. *Corporation of York v. Pilkington*, 2 *Atk.* 302. *Birch v. Holt*, 3 *Atk.* 726. *Anon.* 1 *Ves.* 476. *Anon.* 2 *Ves.* 414.

M. 1724, in *Seacc.*

Spindler and others v. Potter,
Bunb. 181.

P. 1725, in *Seacc.*

Lord Digby v. Meech & al.
Bunb. 195.

H. 1726, cor. King, C.

Anon. Gilb. Eq. Rep. 183.

2 *Eq. Abr.* 172, pl. 3.

H. 1729, cor. King, C.

Lord Falmouth v. Inny,

Mof. 89.

Vide *How v. Tenants of Bromsgrove*, 1 *Vern.* 22. *New Elm Hospital v. Andover Corporation*, 1 *Vern.* 266. *Pawlett v. Ingres*, 1 *Vern.* 368. *Gell v. Rogers*, 1 *Vern.* 441.

T. 1729, cor. King, C.

Baker v. Rogers,

Sel. Ca. in Chan. 74, 75.

2 *Eq. Abr.* 172, pl. 4.

Mr. Attorney-General admitted the rule; but said the plaintiff was the only person interrupted, and therefore the others could not be made plaintiffs; and to make them defendants

17. A man who has been in possession of a water-course 60 years, may bring a bill against a mortgagee who foreclosed the equity of redemption to be quieted in his possession, although he had not established his right at law.

18. Bill to establish a custom for the owners and occupiers of certain lands in a certain parish to keep a bull and a boar. Bill dismissed, because the owners of the inheritance were not parties.

19. Bill to establish a right to liberties granted by the crown must set forth a title, and how the same became vested in the plaintiff.

20. A bill was brought to be quieted in possession of a right of common, and to prevent distresses: and although plaintiff produced affidavits of 50 years quiet possession, and evidence of their right of commonage in the time of Queen Elizabeth; yet the court refused to interpose till one or more verdicts at law; and dissolved plaintiff's injunction obtained for want of answer.

21. A bill may be brought to be quieted in the enjoyment of a mine or colliery before the right is established at law, for fear the mine should be ruined in the mean time, and a proper remedy can be had in no other court.

Bechinall v. Arnold, 1 *Vern.* 354. *Parry*

22. A bill brought by one tenant of a manor, suggesting a custom for the tenants of the manor of A. (of which he was one) to cut turf in the manor of B. To quiet him, and to have an issue directed as to the right, was the end of the bill. *Per cur.*—This bill is improper, and inconsistent with the nature and end of such bills; which is, that where several persons having one and the same right, in which they are

are disturbed, on application to the court, to prevent expence and multiplicity of suits, (which each of them are entitled to in their several rights,) issues will be directed, and one or two determinations will establish the rights of all parties concerned on the foot of one common interest; but in all those bills either all parties join, or a determinate number, in the name of themselves and the rest, and they prefer a bill; but in this case one only brings the bill on the general right, and not on the foot of any particular distinct right. Bill dismissed with costs.

would be only bringing them into court to pay their costs: but per Lord Chancellor this is not suggested in the bill. *Ibid.*

23. Bill to perpetuate the testimony of a witness, for fear he should die during a long vacation. An affidavit was made that the matter lay in the privacy of the witness only (a), and was of great importance. Lord Chancellor ordered the witness under these circumstances to be examined *de bene esse*, to preserve his testimony; but that if he were living at the time of the trial, then that he should be produced (b).

M. 1730, cor. King, C.
Shirley & al. v. Earl Ferrers,
3 P. Wms. 77. *Mof.* 389.
(a) *Sic Pearson v. Ward*, in
Ch. 28 Feb. 1785. *Brydges v.*
Hatch, in Ch. 19 Jan. 1788.
Hankin v. Middleditch, 2 Bro.
Ch. Rep. 641. *Lord Cholmon-*
deley v. Earl of Oxford, 4 Bro.
Ch. Ca. 157.
(b) *Vide Phillips v. Carew*,
1 P. Wms. 117.

Note; Upon the trial of the principal case at the bar in B. R. the deed was found to be forged upon the evidence given by this witness.

24. A single copyholder is not relievable in equity for an excessive fine (that being determinable by a jury); but to avoid multiplicity of suits, several copyholders may join to be relieved against a general fine that is excessive.

M. 1732, cor. King, C.
Cropper v. Clerk, 3 P. Wms. 157.
2 Eq. Abr. 229. pl. 14.
163. pl. 22.
Vide Middleton v. Jackson,
1 Ch. Rep. 33.
Popham v. Lancaster,
Sel. Ca. in Ch. 74. *Mayor of*

1 Ch. Rep. 96. *Disney v. Robertson*, Bunb. 41. *Baker v. Rogers*, Sel. Ca. in Ch. 74. *Mayor of York v. Pilkington*, 1 Atk. 282. *Bouvier v. Prentice*, 1 Bro. Ch. Ca. 200.

25. A bill in equity lies not for a satisfaction where the thing sounds in damages, though it does to confirm a custom.

1713, in Scacc.
Bovey v. Tracey,
2 Eq. Abr. 163. pl. 23.

26. Bill to establish a custom in the case of a common person, must regularly be founded on a trial at law; for when the right is settled, it becomes a bill of peace.

1715, Canc.
Nottingham Town v. Ward,
2 Eq. Abr. 172. pl. 5.

27. So where the city of London brought a bill for a customary toll (a), for going through one of their gates with a carriage, defendant demurred, because the toll was not established at law; and demurrer allowed.

1717, cor. Hardw. C.
City of London v. Thorn or Torn,
2 Eq. Abr. 172. pl. 5.
(a) But where the bill is founded
on an express grant of the toll,
though the rise of the toll cannot
be known, yet the suit being

brought on the grant of the toll, it is in the nature of a bill of peace.

28. Where there has been a possession of a fishery for a considerable length of time, a person who claims a sole right to it may bring a bill to be

c Dec. 1737, cor. Hardw. C.
Mayor of York v. Pilkington and
others, 1 Atk. 282.
See another branch of this case

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in 2 Atk. 302. and 9 Mod. 273. upon a motion to stop an indictment for a breach of the peace in fishing in plaintiff's liberty. *Vide* City of London v. Perkins, 4 Bro. P. C. 157. Bush v. Western. Duke of Dorset v. Girdler, Prec. in Ch. 530. Ld. Teynham v. Heibert, 2 Atk. 483.

16 Nov. 1738, cor. Hardw. C. *Conyers and others v. Lord Abberghavenny and others*, 1 Atk. 285.

15 Nov. 1738, cor. Hardw. C. *Brandlyn v. Ord*, 1 Atk. 571.

9 Aug. 1739, cor. Hardw. C. *Earl of Suffolk v. Green & al.* 1 Atk. 450.

2 Eq Abr. 79. pl. 14.

quieted in the possession, though he has not established his right at law: and it is no objection, upon a demurrer to such bill, that the defendants have distinct rights; for upon an issue to try the general right, they may at law take advantage of their several exemptions and distinct rights.

29. A bill of peace praying an injunction to stay the defendants, who have an interest in the manor of *Tunbridge*, from proceeding at law against the plaintiff for building houses on the manor without leave; and that they may accept of such a compensation as the court shall think reasonable. The court dissolved the injunction, as they cannot be applied to as an arbitrator, nor have any legislative authority; but act in a judicial capacity only.

S. C. A bill of peace may as well be brought by tenants against a lord, as by a lord against tenants.

30. A tenant in tail out of possession cannot bring a bill to perpetuate testimony till he has recovered possession by ejectment; if he does, it will be good cause for the defendant to demur.

31. Bill brought to perpetuate the testimony of witnesses to a bond charged to be usurious, and alledging that the defendant, one *Green*, whom the plaintiff wanted to examine, was very aged and infirm: *Green*, who was a nominee only in the bond, demurred, as the bill sought to subject him to a penalty; and also as the plaintiff does not offer to pay what is really due. If the demurrer had stopped at the first part, it would have been good; but as it goes to the perpetuating the testimony, it is bad; and was over-ruled, but without prejudice to *Green's* insisting on the same thing by way of answer.

S. C. A trustee has as much the benefit of the pleading of this court as he who has the equitable interest, and *cestui que trust* is entitled to have the privilege maintained by the trustee.

S. C. A plaintiff is entitled to perpetuate the testimony of witnesses to a usurious contract, notwithstanding his not offering by the bill to pay.

S. C. A man may bring a bill to perpetuate testimony in many cases, where he cannot bring a bill for relief without waiving the penalty, as in cases of waste, &c.

A demurrer bad in part is void *in toto*; otherwise as to a plea.

32. Where the jurisdiction is drawn out of a court of law, all the parties must be before the court who are necessary to make the determination complete, and to quiet the question.

22 Feb. 1742, cor. Hardw. C.
Poore v. Clark, 2 Atk. 315.

33. Upon a bill for an account of fees, and to establish a right, all persons must be before the court who have any pretence to a right, for they will be bound by the decree of the court; otherwise as to a judgment at law, which will not bind the right of a third person.

6 May 1742, cor. Hardw. C.
Parvett v. Bishop of Lincoln,
2 Atk. 396.

34. Bill to establish a right to an oyster fishery, and to be quieted in the possession of it. Defendant demurred, for that the matter was property triable at law. Lord Hardwicke said, that where the right of a fishery is in dispute only between two lords of manors, neither of them can have relief in equity till the right is first tried at law, and therefore allowed the demurrer.

17 Dec. 1742, cor. Hardw. C.
Lord Tenham v. Herbert,
2 Atk. 483.
2 Eq. Abr. 164. pl. 31.
Note; It was contended that in the Corporation of York v. Pilkington (*ante*) no trial at law was had to establish the right. To which Lord Hardwicke observed, that there the plaintiffs were in possession of a right of

fishery for nine miles together, consequently their jurisdiction must necessarily be entangled with the lords of different manors, and in such a case suits at law would be endless, for they would have to contend with as many different titles.

S. C. Where a man sets up an exclusive right, and the persons who can controvert that right are so numerous, that he cannot by one action at law quiet the right, he may go into equity first, and then his bill is called a *bill of peace*, and the court will direct an issue to determine the right, as between lords of manors and their tenants, or the tenants of one manor and the tenants of another.

In the principal case Lord Tenham did not by his bill charge any possession for thirty-eight years, so that the present was in nature of an ejectment bill. Such a case is properly determinable at law, for it is a mere question of right between two persons; but as to the corporation of York (in the cited case) they must have gone all round the compass to have come at the right at law.

35. A chaplain or curate of a perpetual curacy, having parochial rights and privileges, may bring a bill in his own name to establish those rights, but he cannot sue by way of information in the name of the Attorney-General, as in the case of a charity.

14 July 1752, cor. Hardw. C.
Brereton v. Tamberlaine,
2 Ves. 426.

36. A bill to perpetuate testimony may be dismissed for want of prosecution, any time before replication and examination of witnesses. After the witnesses are examined, plaintiff must not proceed to set down his cause for hearing (for the end is answered by the examination); and if he does, his bill will be dismissed with costs, so as not to pre-judice him in the preservation of his testimony.

20 July 1754, cor. Hardw. C.
Johnson v. Smith, 237.

1 Feb 1773, Dom. Proc.
Welby, Esq. v. Duke of Rutland,
 6 Bro. P. C. 575.

37. Where a bill is brought to establish a legal title, and for a perpetual injunction, it is the established practice of courts of equity to dismiss the bill, notwithstanding the defendant has answered, and insisted on matter of title.

M. 1795, in Scacc.
Biddisford v. Partridge,
 3 Anstr. 646.

Note: The court first doubted the propriety of this application, and started as a difficulty that the new parties by cross examination may obtain evidence to contradict the former; but the motion seems to suppose the examination on the second commission alone to be legal evidence.

38. A bill to perpetuate testimony of a modus, being amended by adding an essential party, after the commission executed, but before publication a new commission was granted.

T. 1796, in Scacc.
Scarr v. Trinity College, Cambridge,
 3 Anstr. 768.

39. In this case objections were made to a bill to perpetuate testimony, for that it went on to pray relief in the same matters, to which the examination of the witnesses extended. Held, the prayer for relief was good, and the objections were over-ruled.

See *ante*, sect. 2. See also *Evidence*.

Sec. 11. Of Bills of Interpleader.

M. 1685. cor. Jeffries, C.
Anon. 1 Vern. 351.

1. IN a bill of interpleader, if a trial at law is directed between the defendants, the suit is at an end as to the plaintiff; so that if he dies, the defendants may proceed without reviving the cause, for each defendant is in the nature of a plaintiff.

P. 1731, in Scacc.
Erlington v. Attorney-General,
 Bunb. Rep. 307.
 2 Eq. Abr. 14. pl. 6.
 (a) It seems to be an established rule, that in all cases of interpleader, an affidavit that there is no collusion between plaintiff and any of the parties must be annexed to the bill.

2. Upon a bill of interpleader against the Attorney-General and the executors of Sir R. K., it was agreed *per cur.* that there is a necessity of annexing an affidavit to the bill, or else it is demurrable to. *Quare*, if necessary where only private persons are defendants (a)?

27 Feb. 1747, Cor. Hardw. C.
Mitchell v. Smart, 3 Atk. 606.

3. An executor being in *auter droit*, is not entitled to bring a bill of interpleader till, as standing in his testator's place, he has made himself a debtor; and that he cannot be till he has proved the will. A bill in equity is in nature of a declaration at law, which cannot be filed till after probate, though an action may be brought by the executor.

9 June 1749, cor. Hardw. C.
Metcalf v. Harvey, 1 Ves. 248.
 (a) The bill in this case was founded on a rumour that there

4. Demurrer, for that the plaintiff in a bill of interpleader (a) did not file an affidavit that the suit was at his own expence, and for that no case was

was stated to entitle plaintiff to relief, or compel defendant to put in an answer; and for that in a bill of interpleader it must be shewn that plaintiff is in danger of paying rent, &c. a second time, and that such a bill on demurrer will be taken strongly against the party whose bill it is. *Per Lord Chancellor*—This is a very particular case, but as it is a demurrer to the whole bill, if there is any part of it which defendant ought to answer, the demurrer must be over-ruled. There is no rule of court requiring that plaintiff should swear the suit is at his own expence (b): the material part of the affidavit is, that plaintiff did not collude with any of the defendants. Lord Chancellor was not willing to allow new inventions in interpleading suits: they might be dangerous, being formed in some measure as interpleaders at law, in which it must be shewn to be between persons in *rerum natura*. Suppose a guardian having the infant in his custody conceals and will not produce him, but sets up a title to himself, and the infant is the person suggested to have right to controvert that title: in such a case his lordship thought such a bill might be brought, and also to compel the guardian to produce him. The bill in the principal case prays not only to interplead, but for an injunction to stay proceedings in an ejectment: that cannot be; for such a bill lies only as to the payment of some demand of money, and not as to the possession of an estate. Then supposing the interpleading part of the present bill could be considered (which his lordship was not willing to allow) as a bill for a discovery of defendant's title to the possession of the estate in question, and to the rents and profits. Plaintiff is entitled to that discovery, but defendant having demurred to the whole bill, as well to discovery as to relief, the demurrer must be over-ruled.

5. Bill of interpleader by the tenants of Lord J. against several sets of annuitants who had distrained on their farms, praying that they might interplead among themselves. The rents were paid into court, and the only question as to the plaintiffs was the costs. *Per Lord Chancellor*—The tenants at all events ought to have their costs; and nothing can be more clear, as the idea of a bill of interpleader presumes a right in the plaintiff paramount the interpleader. The party calling on others to inter-

was issue by Lady H. which issue was suggested to be entitled to the estate in question, and praying that if there was any such person, he might interplead with the defendant; and also praying an injunction to stay proceedings in ejectment, or any action for mesne profits.

(b) Such an affidavit would require the denying it, even in cases where a man may bear the costs of a suit, without being a maintainer, as where a father furnishes the expences of a suit by his son.

22 Feb. 1787, cor. Thurlow, C.
Aldrich v Thompson,
2 Bro. Ch. Ca 149.
In *Dungey v. Angove*, 2 Ves.
jun. 307. Lord Loughborough
said, this was a clear case of interpleader.

plead is in the nature of a stakeholder. Costs ordered out of the rents in court.

T. 1791. cor. Thurlow, C.

Dowson v. Hardcastle,

1 Ves. jun. 369.

In *Dungey v. Angove*, 2 Ves. jun. 304. there is an instance of exemplary costs decreed to the defendants, that being a case of fraud and collusion.

6. Plaintiffs in a bill of interpleader are entitled to their costs, but there is no instance of costs being given to a defendant. Plaintiffs in this case were mere stakeholders, and were driven to file their bill by an action at law. Lord Chancellor was very desirous in this instance to give defendants their costs also, but could find no precedent.

30 Ap. 1793, cor. Loughb. C.

Langston v. Boylston,

2 Ves. jun. 101.

7. Defendant *B.* having deposited sundry certificates of the *American* loan with plaintiff his banker, for safe custody, was soon after arrested and thrown into prison, as a partner in an insolvent mercantile house. Plaintiff then refused to deliver up his deposit, whereupon he was served with attachments by the joint creditors of *B.* and his partners, and was also arrested by *B.* in trover for the certificates. Plaintiff then brought a bill of interpleader, praying also an injunction against the proceedings at law, and offering to bring the deposits into court. *Per* Lord Chancellor—An interpleading bill is exactly upon the footing of an injunction to stay waste, and may be supported by specific evidence of the facts, as well as it is in all cases by specific evidence that there is no collusion (a). If plaintiff had applied to the court in which he was arrested in trover, that court would have discharged him on common bail upon his lodging his deposit in court, and would have stayed proceedings on the action till the attachments were disposed of. The present is precisely the case of an interpleading bill. Plaintiff claiming no right in the subject, is doubly vexed by having two legal processes issued against him at the same time by different persons; he comes upon the most obvious equity to insist that the claimants may settle the contest among themselves. It is said plaintiff may either defend himself against the attachments or against the action in trover, and which-ever case is first determined decides the claim of the other: but plaintiff ought not to be placed in that situation; here is no appearance of collusion, nor can it be presumed against the affidavit (b) annexed to the bill. The plaintiff's credit stands unimpeached, and it cannot be expected that he as a banker should fight the cause of *B.* And it was an outrageous measure to arrest the plaintiff in trover, and make use of

(a) To all bills of interpleader an affidavit must be annexed, that the plaintiff does not collude with any of the parties.

(b) Counter affidavits are not permitted to be read against the affidavit annexed to an interpleading bill.

of the legal fiction of conversion, when his desire was to deliver over the property to whomsoever he could with safety.

Note; A claim only is a ground of interpleader.

The court of *B. R.* however, having granted a rule *nisi* to stay proceedings in trover, and discharge defendant at law on common bail, he consented that plaintiff should defend the attachments in his name, and which it was said he had been always ready to permit. This of course put an end to the action of trover.

8. A tenant cannot fill a bill of interpleader against his landlord on notice of ejectment by a stranger under a title adverse to that of his landlord (*a*). On a suspicion of collusion in this case, an inquiry into the circumstances was directed (*b*); and the report confirming the fraud, the bill was dismissed with costs to the landlord, as between attorney and client, to be paid by the plaintiff and his solicitor, and the latter to shew cause why he should not be struck off the roll.

Where there is a demise a lessor cannot bring an action for use and occupation, as a stranger may, but he must sue on the deed for the rent.

only case in which a tenant can come into equity upon an interpleading bill is where the landlord has done some act himself to embarrass the tenant, as is the case of a mortgage.

(*b*) The affidavit on filing the bill in this case was not in the usual form, but to this effect: "That the bill annexed is not with the consent, knowledge, or combination of either of the defendants therein mentioned; but merely of this deponent's own free will."—As to the form of this affidavit, his lordship said, he was glad it was so irregular, since it has spared the crime of perjury.

Lord Chancellor then (after commenting upon *Metcalf v. Hervey*, 1 *Ves.* 248.) observed, that a bill of interpleader is defined to be, where two persons claim of a third the same debt or the same duty. With regard to the relation of landlord and tenant, the right must be the object of an ejectment. The law has taken such anxious care to settle their rights arising out of that relation, that the tenant attacked throws himself upon his landlord. He has nothing to do with any claim adverse to his landlord. He puts the landlord in his place. If the landlord does not defend for him, he recovers upon his lease a recompence against the landlord. In case of another person claiming against the title of his landlord, it is clear, unless he derives under the title of the landlord, he cannot claim the same debt. The rent due upon the demise is a different demand from that which some other person may have upon the occupation of the premises. It is a small matter upon the justice due

H. 1704, cor. Loughb. C.

Dunsey v. Angove,

2 *Ves. jun.* 304.

(*a*) Lord Chancellor could conceive a tenant entitled to bring a bill of interpleader where two persons dispute which of them is the representative of the lessor; but in this case it would be monstrous if the tenant could make his landlord disclose his title by an interpleading bill. His lordship doubted if he did not act criminally in hearing such a bill, after the tenant has acknowledged his landlord's title by accepting a lease, merely on the suggestion of a stranger claiming a title.—The

to the rights of the country, to dismiss the present bill: it is as pernicious a practice, and as dangerous to the landed property of the kingdom, as ever came before a court; and if it is tolerated, a tenant in possession, whose duty is to stand by and defend his landlord, becomes the instrument to betray him; and through the medium of equity to call upon him to do that which it was the prudence of the law to prevent, to make a disclosure of his title attacked adversely, and that through the machinations of his own tenant.

The present bill is singular in another respect, for it suggests a case. An interpleading bill never does that.

To support a bill of interpleader by a tenant, two persons must claim the same rent in privity of tenure and contract, as in the case of a mortgagor and mortgagee, trustee and *cestui que trust*; or where the estate is settled to the separate use of a feme covert, of which the tenant has notice, and the husband has been in receipt of the rents, and differences arise between them, and she claims the rent. There may be a variety of cases in which the tenant may file a bill of interpleader, as not disputing the title of the landlord, but affirming that title, the tenure, and the contract, by which the rent is payable, and where it is uncertain to whom it is to be paid.

H. 1795, in Scacc.
Smith v. Target & al.
2 Anst. 529.

9. Though this was a cause of little consequence, Lord Chief Baron expressed his opinion, that a bill of interpleader will not lie by a tenant against his landlord, or in any respect to question his title.

It was said in this case, that a tenant, though threatened with suits at law on a title adverse to that of his landlord cannot make them interplead. The bill in this case was dismissed with costs.

M. 1796, in Scacc.
Johnson & al. v. Atkinson & al.
3 Anst. 798.

10. A tenant cannot file an interpleading bill against his landlord.

S. C. Where one claimant seeks a certain rent from the tenant in possession, and the other seeks unliquidated damages for use and occupation, the tenant cannot make them interplead.

M. 1797, in Scacc.
Woolaston & al. v. Wright & al.
3 Anst. 801.

Vide Johnson v. Atkinson, sup.
Atkins v. Hutton, Wright v. Fox, 3 Anst. 803. (n.)

11. Where one rector claims a modus, and the rector of another parish claims tithes in kind of the same lands, they cannot be made to interplead.

Sec. 12. Of *Certiorari* Bills, and Bills of Appeal and Rehearing.

1. BILL of appeal to set aside a decree in the county palatine of *Chester*, charging, that it was made on insufficient grounds. Plea, the ancient usage and practice of the palatine court, and the justice of the decree. Lord Keeper thought an appeal would lie; so would a *certiorari* bill to remove the cause: but a bill of review would not lie, for that is only to reinspect what the same court has done before. Lord Keeper would not determine the cause, but ordered that he might be attended with precedents. Afterwards in same term the cause came on again, when his lordship said, that the appeal would not lie to the court of Chancery, and that if there be any appeal, it must be to the king himself. Plea allowed.

T. 1683, cor. North, C. S.
Portington v. Tarbock,
1 Vern. 178. 184.

2. Bill of appeal and review of a decree in the county palatine of *Chester*. Defendant demurred. Demurrer allowed; for if there is any appeal, it must be to the king himself.

T. 1683, cor. North, C. S.
Jennett & Ux. v. Bishop & al.
1 Vern. 184.

3. Bill of appeal from the court of policies and assurances in *London* (a), complaining of their decree, for that the bill was taken *pro confesso* against the defendant after the first summons. Lord Keeper reversed the decree; for that the defendant had not been fairly summoned according to the stat. of 43 *Eliz.*; and the plaintiff undertaking not to insist on the statute of limitations, the matter was agreed to be tried at law by action on the case.

H. 1684, cor. North, C. S.
Johnson v. Desmoneers,
1 Vern. 223.
1 *Eq. Abr.* 83. pl. 5.
(a) See this case more fully stated
post, tit. *London*; and for an account of this obsolete court, see
stat. 43 *Eliz. c. 12.* & 14 *Car. 2. c. 23.*

4. Upon a bill of appeal from an inferior court, the plaintiff must complain of the injustice done him by the inferior court; but he is not obliged to assign particular errors, which is the difference between a bill of appeal and a bill of review: but in this they agree, that both must be upon the same evidence; and the appellant cannot examine *de novo*, though in the spiritual courts they examine over and over again, and proceed upon new allegations. Lord Chancellor inclined to think that a bill of appeal would lie from an inferior court to the court of Chancery, as at common law the King's Bench corrects all inferior courts.

H. 1686, cor. Jeffries, C.
Addison v. Hindmarsh,
1 Vern. 443. (n.)

H. 1704, cor. Wright, C. S.
Stephenson v. Houlditch & al.
 2 Vern. 491.

1 Eq. Abr. 81. pl. 2.

Note; The registrar being in court, said, these causes were most commonly sent back.

5. If upon a *certiorari* bill the cause is brought on to a hearing, the court, if they think fit, may make a decree, or send it back to the mayor's court to be determined there: sometimes the court retains the bill, sometimes sends it back after publication passed, and sometimes after a *subpœna* to hear judgment, and before the cause comes to a hearing.

10 May 1767, cor. Camden, C.
Smith v. Clay, Amb. 645.

1 Eq. Abr. 82.

Note; The case of *Edwards v. Carrol*, 5 Bro. P. C. 466. is decisive on this point; it was there resolved that 20 years should bar a bill of review, because the statute of W. 3. had barred all writs of error after that period.

6. A bill of rehearing will not lie after 20 years from making the decree; and the same doctrine holds in bills of review.

See *Appeal, Costs, Decree, Inferior Courts, Injunction, Jurisdiction, Writs.*

Sec. 13. Of Bills original after a Decree.

H. 1700, cor. Wright, C. S.
Jabrison & Ux. v. Northey & Ux.
 2 Vern. 409.

1 Eq. Abr. 83. pl. 3.

Proc. in Ch. 134. E.C. differently stated.

Vide 1 Ch. Ca. 45. where it is said that no original bill should be brought to explain a decree on any matter precedent to the decree; and in Ca. temp. Taib. 301. it was determined that a decree cannot be set aside by an original bill, unless in case of apparent fraud.

1. If a bill be brought to have the benefit of a former decree, the plaintiff cannot examine witnesses (much less the same witnesses) to matters in issue in the former cause; but on such a bill the court may examine the justice of the former decree, but then it must be by proofs taken in the cause wherein that decree was made,

P. 1706, Canc.
Vare v. Wardall,
 1 Eq. Abr. 81. pl. 4.

2. An original bill barely in nature of a bill of revivor, does not open the first decree to have it looked into; but if it be to enforce a decree, or carry it further, then it opens the cause.

24 Feb. 1709, Dom. Proc.
Earl of Peterborough & al. v. Sir John Germaine & Ux.
 1 Bro. P. C. 283.

3. It is against the known and established rules of all courts of equity, that after issue joined, publication passed, and the cause heard, the same matters, or the same title, should be drawn into question again by another original bill; for if this was once admitted, it would introduce perjury, and make suits endless.

P. 1713, cor. Harcourt, C.
Whishall v. Short,
 2 Eq. Abr. 177. pl. 1.

7 Vin. Abr. 298. pl. 15.

15 Vin. Abr. 478. pl. 2.

Decree affirmed in Dom. Proc.

1 Bro. P. C. 414.

Lord Chancellor said the plaintiff came too late; that he knew

4. Bill to redeem after a decree of foreclosure signed and inrolled in 1697, suggesting fraud and surprise in obtaining the decree, and a parol declaration before and after the decree, that the mortgagee was willing to take his principal, interest, and costs, and quit the estate. Defendant pleads the decree, and denies the fraud, &c. The depositions

depositions of several witnesses were read to prove such a parol declaration by the mortgagee, and that plaintiff and defendant in the former cause had the same clerk in court, &c. But bill dismissed with costs.

and would shake abundance of titles. Perhaps there may be an instance of relief upon a bill to redeem after foreclosure; but then the bill was brought in a very short time after the decree, and there must be some very extraordinary circumstances in the case; but said he did not remember any such case of relief.—*Ibid.* in S. C.—A court of equity is cautious to make a decree without a precedent. MS. ca.

no instance where a man was let in to redeem by a new bill after a decree for foreclosure signed and inrolled upon any parol agreement or declaration, or by reason of overvaluation of the estate; such a thing being of dangerous consequence,

5. Defendant C. in 1712. brought a bill against the now plaintiff and M. his wife, who was the widow and executrix of B., for an account of B.'s estate, and obtained a decree; then M. died; and before the decree was inrolled the now plaintiff petitioned for a rehearing, and at the same time preferred an original bill, suggesting new matter came to his knowledge since the decree, and obtained an order to rehear the former cause. At the hearing, plaintiff's counsel admitted the justice of the former decree, but insisted that the merits in the present cause appeared otherwise, and therefore prayed to set aside the former decree, and to have a new decree in plaintiff's favor. The former decree was confirmed, and the present bill dismissed.

T. 1716, cor. Cowper, C.

Hicks v. Conyers,

7 Vin. Abr. 398. pl. 16.

2 Eq. Abr. 177. pl. 2.

Lord Cowper said, It is irregular to bring a new bill to vary a decree already pronounced.—A defendant in this court may bring a cross bill before any decree is pronounced in the original cause, and if the original cause is heard before the cross cause, the decree in the original cause may afterwards be varied by the decree in the cross cause; but in that case the cross bill must be brought before any decree made in the original cause.—By the course of the court, if the original decree had been inrolled, the now plaintiff, upon affidavit of new matter

came to his knowledge since the former decree might have a bill of review; but he cannot now be relieved against the former decree by this new bill and rehearing the former cause; for the decree is right upon the pleadings and proof, and therefore cannot be varied upon a rehearing: and it is contrary to the course of the court to alter a decree upon an original bill, exhibited after the decree is pronounced.—*Ibid.*

6. On a new bill to carry a decree into execution, the court may vary and alter what is thought proper; on a rehearing, no further than the petition extends; but if the petition be against the decree in general, though particular reasons are given, the whole is open; otherwise it is if the petition be only against one or two particulars.

1725, Canc.

Colchester v. Colchester,

Sel. Ca. in Chan 13, 14.

2 Eq. Abr. 281. pl. 3.

7. It was ruled on motion in this case, that if an original bill be brought for matters, part of which are contained in a former bill and decree, and part new or by way of supplemental bill, the court will, on demurrer to so much as was contained in the former decree, send it back to the Master to see what was and what was not in the first bill, and allow the demurrer accordingly.

H. 1726, cor. King, C.

Anon. Gilb. Eq. Rep. 184.

2 Eq. Abr. 177. pl. 3.

8. In this case it was laid down as a rule by Lord Talbot, that if a decree be obtained, and that decree inrolled, so that the cause cannot be reheard upon petition, the party aggrieved can in no case

T. 1735, cor. Talbot, C.

Taylor v. Sharp, 3 P. Wms. 372.

2 Eq. Abr. 177. pl. 2.

set

set aside this decree, or obtain relief against it by original bill; for then the decrees of the court would be opposite and contrary the one to the other, which would breed the utmost confusion. The only remedy is by bill of review, which must be either for error appearing on the face of the decree, or upon some new discovered matter (a).

(a) *Vide Standish v. Radley*, 2 Atk. 177. *Gould v. Tancréd*, 2 Atk. 533. *Norris v. Le Neve*, 3 Atk. 27. *Wortley v. Birkhead*, 3 Atk. 809. and 2 Vef. 571.

23 Mar. 1742, cor. Hardw. C.
Bennet v. Lee, 2 Atk. 529.
Vide Bennet v. Wade, 2 Atk.
324. of which case this is a
branch.

9. Where parties apply for leave to bring a new bill upon new matter discovered after a decree, they must shew that it is *relevant*; for its being merely *new matter* will not entitle them to such a bill.

3 Aug. 1754, cor. Hardw. C.
Wortley v. Birkhead,
3 Atk. 809. 2 Vef. 571.

10. After a decree in a cause, a new original bill cannot be brought between the same parties, and for the same matters; for if such a bill were permitted, it would make great confusion in the proceedings of the court, and produce the utmost inconvenience.

See *Bill of Review*, ante, f. 7. *Decree*.

Sec. 14. Of Cross Bills.

H. 1683, cor. North, C. S.
Earl of Newburgh v. Wren,
1 Vern. 221.

Though the law may be so, the complier submits it ought not to be practised, for if in the case of a mortgage the Deputy Receiver should take the account in one way, and the Master should take it in another, the utmost confusion might arise, though in the principal case Lord North said there had been several precedents of injunctions sent to the court of Exchequer in such cases.

Vide Coysgain v. Jones, Amb. 613, where a bill was brought by one set of creditors in the Exchequer and another in Chancery for the same purpose.

19 June 1713, Dom. Proc.
Sher v. Cock, *Giles's P. C.* 437.

1. IF a bill is exhibited in one court of equity, there may be a cross bill in another; as, if the mortgagor exhibits a bill to redeem in the Exchequer, defendant may bring a bill in Chancery to foreclose.

2. *A.*, plaintiff, files an original bill against *C.*; who, after answer, files a cross bill against *A.*, and makes *B.* and *D.* parties; and obtains an order that the plaintiff in the original cause shall stop till the defendants answer the cross bill, which *A.* does; but *B.* and *D.* are never served with any process. For this artifice the cross bill was dismissed.

M. 1714, cor. Cowper, C.
Sir Caesar Child and others, Assignees of Sir Stephen Evans v. Frederick, Esq.
1 P. Wms. 206.
2 Eq. Abr. 180. pl. 2.

3. *A.* brings his bill against *B.* and *C.*, who put in insufficient answers, and prefer their cross bill against *A.* *B.* becomes bankrupt: his assignees file a bill in the nature of a bill of revivor against *A.*

A. They shall not go on till C. has answered A.'s bill.

Vide Stewart v. Roe, 2 P. Wms. 435.

4. A bill filed, but no process taken out upon it. If a cross bill be filed, the plaintiff in the original bill cannot compel the defendant to answer his bill first, not having taken out process on his bill.

H. 1722, in Seacc.
Price v. Lord Coningsby,
Bunb. 124.

5. Equity will never countenance demands of an unfair nature; as, for attending at auctions as a puff, to enhance the price of goods; nor will equity suffer them to be set up against just and fair demands. In an account a cross bill for such purpose was dismissed with costs.

6 Mar. 1726, Dom. Proc.
Walker v. Gaskyne,
Gro. & Rud. Low & Eq. 39.
2 Eq. Abr. 161. pl. 13.
Vide 13 Vin. Abr. 543. pl. 12.
S. C. cited as from a MS. Rep.
said to be Lord Harcourt's.

6. The original bill is to be first answered; but if the plaintiff after the cross bill filed amend his bill, he loses his priority.

H. 1727, cor. King, C.
Steward v. Roe, 2 P. Wms. 435.
Vide Child v. Frederick, 1 P.
Wms. 266. Long v. Barton,
2 Atk. 218. Rattray v. Darley, 3 Atk. 724.

7. Cross bills are in nature of a defence, and were first allowed that the party might state his own case more to his advantage than he could by his answer.

T, 1730, cor. King, C.
Ward v. Eyles, Mof. 382.
Note; The rules relating to
cross bills were introduced by Sir
Nicholas Bacon.

Note; Also a cross bill may be
filed to answer the purpose of a plea *pais darrein continuance* at law.

8. Where a defendant in a cross bill, but plaintiff in the original bill, is in contempt for not putting in an answer, the proper motion is to enlarge publication in the original to a fortnight after the answer is come in to the cross bill.

12 Jan 1738, cor. Hardw. C.
Creswick v. Creswick,
1 Atk. 291.

This was laid down as a general rule by Lord Hardwicke in this case.

Note; A cross bill must be filed before publication is passed on the original bill and not after, except the plaintiff in the cross bill will go to a hearing upon the depositions already published, because of the danger of perjury and subornation, if the parties should after publication of the former depositions examine witnesses *de novo* to the same matter before examined unto. *Vide* Neif. Ch. Rep. 103. 1 Eq. Abr. 80. pl. 1.

9. The court will not stay proceedings in an original cause till the answer comes in to a cross bill, but will only stay publication. *Secus*, if a cross bill be brought before answer put in to the original bill.

4 Dec. 1739, cor. Hardw. C.
Ramkiffenear & al. v. Barker & al.
2 Atk. 19. 21.

10. When a bill prays an account, and allowances in that account, a defendant may equally make objections as if he had brought his cross bill.

27 Oct. 1740, cor. Hardw. C.
Ayliffe v. Murray, 2 Atk. 59.

11. If after a cross bill filed plaintiff in an original bill will amend it in material parts, and thinks fit to compel an answer to the amendments at the

12 Nov. 1741, cor. Hardw. C.
Long v. Burton, 2 Atk. 218.

same time with the original bill, he waives his priority of answer to the original, which is a privilege the plaintiff has in right of his original bill.

Where a bill is amended both as to discovery and relief, the pendency of suit as to those parts is only from the time of amendment.

7 Feb. 1756, cor. Hardw. C.
Rattray v. Darley, 3 *Atk.* 724.

12. *R.* and his wife filed an original bill, to which defendant pleaded, and his plea was allowed. *D.* filed a cross bill against *R.* and his wife, to which they put in their answer, and exceptions were taken. Then *R.* and his wife filed their amended bill against *D.*, who appeared and prayed six weeks time to put in his answer to the amended bill, after *R.* and his wife shall have answered the cross bill. Plaintiff in the cross bill having procured a report that the answer of *R.* to it was insufficient, *R.* by that means lost his priority.

31 July 1751, cor. Hardw. C.
Aylet v. Esly, 2 *Ves.* 336.
(a) Such a motion is of course where the original cause is not proceeded in.

13. Upon a motion as of course to *enlarge* publication upon a cross bill, after the original was proceeded in (a), Lord Chancellor desired it might be observed, that this motion was not of course, but special on notice, so that the court might judge of it on the circumstances, for otherwise it would be easy to delay the hearing of a cause by keeping this up. Note; The original cause was actually set down in this case.

22 July 1752, cor. Hardw. C.
Berkeley v. Rider, 2 *Ves.* 537.

14. That which is admitted by answer to the original bill cannot be questioned by a cross bill; but defendant must move to amend his answer before he can bring the matter into the cause.

7 Aug. 1754, cor. Hardw. C.
Kemp v. Mackrell, 3 *Atk.* 812.
2 *Ves.* 580.

15. A cross bill was always considered a defence, and so connected with the original bill, that they are in fact but one cause: it is natural therefore, that where the court has given defendant his costs in the original bill, he shall be at liberty to deduct the costs he was to pay on account of the cross bill out of what he is to receive on account of costs upon the original bill.

12 Mar. 1755, Dom. Proc.
Moughton v. West, Widow, & al.
5 *Bro. P. C.* 152.

16. Where a bill of review is filed for reversing a former decree; and besides specifying errors in the decree, contains *original* matter, and is filed without leave, it ought not to be set aside for irregularity: for, under these circumstances, it should be considered as a cross bill.

17. A cross bill, to be let into possession upon a mere legal title, was dismissed with costs, (though the original bill was dismissed,) for it is the object of an ejectment.

T. 1790, cor. Thurtow, C.
Calverley v. Williams,
1 Ves. jun. 213.

Sec. 15. Of Bills preferred *pendente lite*, and of the Cases where two Bills are brought for the same Matter.

1. TO a bill by an administrator for discovery of personal estate, it is no bar to the discovery to plead that a suit was depending in the spiritual court to revoke the administration; and defendant's plea of the matter was over-ruled, as containing no equity to bar the discovery.

M. 1682, cor. Chareltan, J.
abf. C.
Wright v. Blucke,
1 Vern. 106.

2. Plaintiff brought his bill in Chancery to foreclose the defendant, who pleaded that he had already exhibited his bill in the Exchequer to redeem, to which the now plaintiff had put in his answer; and defendant further pleaded the pendency and priority of the former suit in the Exchequer in bar. Lord Keeper over-ruled the plea, saying, that the court of Chancery must deny justice to none; and that in any case, if the mortgagor exhibited a bill to redeem in the Exchequer, the defendant there was at liberty to bring a bill in Chancery to foreclose. Defendant was ordered in this case to pay costs.

H. 1683, cor. North, C. S.
Earl of Newburgh v. Wren,
1 Vern. 221.
1 Eq. Abr. 134. pl. 3.

It was argued in this case that infinite difficulty might arise if the Deputy Remembrancer should take the account one way and the Master should take it another; and besides the court of Chancery might not think a redemption proper, while the court of Exchequer might decree a redemption, in which case the jurisdictions would clash; but the Lord Keeper said, there were many precedents of injunctions sent by the court of Chancery to the court of Exchequer in such cases.

Whatever may be the contests between the two courts with regard to their jurisdiction, the compiler submits the measure very unadvisable for any suitor to pursue.
Vide Coysgarne v. Jones, Ambl. 613. where a bill was brought by one set of creditors in the Exchequer and another in Chancery for the same purpose.

3. Where a man is to be affected with a *lis pendens*, there ought to be a close and continued prosecution, as in the case of a bill to compel the father to perform articles made on his son's marriage, the father mortgages the land that was to be settled pending the suit, and the mortgagees are made parties, and then the father dies. *Per cur.*—Here the *lis pendens* is well, for the plaintiff being heir he cannot revive the suit against himself.

H. 1684, cor. North, C. S.
Presion v. Tubbin, 1 Vern. 236.

4. A *subpœna* served, and a bill filed, is a *lis pendens* against all persons: the service of a *subpœna*, without a bill's being actually filed, makes no *lis pendens*; but the bill being filed, the *lis pendens* comes from the service of the *subpœna*, though it

P. 1685, Canc.
Anon. 1 Vern. 318, 319.
Note; It has been the practice of the Bank of late years, upon service of a *subpœna*, to refuse a transfer of any of their funds, by which it seems they consider a

subpœna not merely as notice of a *lis pendens*, but with regard to themselves as an injunction; this point, however, coming before Kenyon, M. R. in *Williams v. Williams*, 2 Bro. Ch. Ca. 88. his Honor observed, that although this was so in practice, it was not so in law, nor would the service of a subpœna be an answer to an action for refusing a transfer.

it be not returnable till the next term, and though the party lives never so remote; for otherwise, a man upon the service of a *subpœna* might alien his lands, and prevent the justice of the court: but that being observed by the counsel to be a hard fiction in equity to bind purchasers, it was proposed that some course might be taken, by having some public record or calendar kept, whereunto purchasers might have resort, and see what lands are in demand in Chancery, as they might at law in case of fines. *Curia advisare vult.*

P. 1688, cor. Jeffries, C.
Dulwich College v. Johnson,
2 Vern. 49.

1 Eq. Abr. 77. pl. 12.
Vide *Wright v. Blicke*, 1 Vern.
106. where the right of admin-
istration was contested *et vide*
Morgan v. Harris, 2 Bro. Ch. Ca. 121.

P. 1688, Canc.
Gower v. Earl of Danby,
3 Ch. Rep. 216.

H. 1730, cor. King, C.
Anon. Mos. 268.

9 Feb. 1737, cor. Hardw. C.
Phipps v. Steward, 1 Atk. 286.
Vide *Wright v. Blicke*, 1 Vern.
106. *Dulwich College v. John-*
son, 2 Vern. 49.
Vide *Colvil v. Shadwell* cor.
Cowper, C.

5. Bill against an executor for an account of testator's personal estate. Plea, that the will was not proved, but controverted in the spiritual court. *Per cur.*—Discoveries have often been ordered *pendente lite* in the spiritual court.

6. Lands were settled by parliament for payment of Mr. *Coke's* debts. The trustees brought a bill against Mr. *Coke's* administrators to discover the personal estate, and the administrators, who were such as creditors, brought their bill against the trustees. It was decreed that they shall sell, &c., and that all creditors may come in by a certain time, contributing to the charges. And now plaintiffs, as other creditors, exhibit their bill against the administrators and the trustees to discover the personal estate, and to have the lands sold, &c. Defendants objected that plaintiffs ought to have come in as creditors by motion upon the former bills. *Sed per cur.*—This bill was well brought, because it called the administrators themselves to an account, which by the former bills could not be done.

7. If a bill is depending here, and the plaintiff files another for the same matters, the defendant may move to have them referred, and one dismissed.

S. C. But if a bill is dismissed in the Exchequer, and then filed here, he cannot dismiss it on motion, but must plead to it.

8. Whilst a suit is depending in the ecclesiastical court for an administration, a bill may be brought here for an account of the personal estate.

The reason why a bill is allowed to be brought before probate is, that the ecclesiastical court have no way of securing the effects in the mean time.

9. Bill

9. Bill by an administrator of a judgment creditor; the administrator died, and a bill of revivor was brought by the administrator's executor. This was thought to be wrong, and then plaintiff took out administration *de bonis non* to the judgment creditor, and brought another bill of revivor, describing himself both as executor and administrator *de bonis non*. To the second bill, pendency of the former suit was pleaded, and it was referred to the Master whether both bills were for the same matter. The Master certified, that both bills were for the same matter, and brought by the same person, but in different rights. Lord Chancellor dismissed the first bill with costs generally, and set aside the plea without costs, and directed the suit to stand on the second bill.

P. 1740, cor. Hardw. C.
Huggins v. York Buildings Company,
 1 Eq. Abr. 3. pl. 14.
 2 Atk. 44. *Barnard*. 33.

10. A bill for a discovery of assets may be brought against an heir in order to preserve a debt, without making an administrator a party, if the representation is contesting in the spiritual court; and it is so suggested in the bill.

31 July 1740, cor. Hardw. C.
Plunkett v. Penfon, 2 Atk. 31.

11. Where a bill is amended both as to discovery and relief, the pendency of suit as to those parts is only from the time of the amendment.

12 Nov. 1741, cor. Hardw. C.
Lung v. Burton, 2 Atk. 218.

12. Three creditors who were within the terms of a trust created by a will for the payment of debts, bring a bill to carry the trusts of the will into execution; the rest of the creditors brought a second bill for the same purpose, and obtained an order at the Rolls that both bills might be referred to the Master, to certify which would be most for the creditor's benefit. Mr. Baron *Clarke* discharged the order, observing that it was the first of the kind ever made, being of opinion it had never been reduced to a general rule, nor never could, that one bill only should be depending where a number of creditors are concerned.

H. 1747, cor. Clarke, B. abf. C.
Anon. 3 Atk. 602.

S. C. Where there are two suits brought by different *prochein amies* of an infant, the court will refer them to see which is most proper, because the court as the guardian of infants will take care that what is done shall be for their benefit.

13. An admission of a debt obtained by fraud or force cannot be set aside on motion; but it is a ground for a new bill; though the former suit is depending.

15 July 1747, cor. Hardw. C.
Townsend v. Lowfield,
 1 Vef. 36.

7 Aug. 1750, cor. Hardw. C.
Gage v. Bulkeley,
 1 Eq. Abr. 75. Ambl. 103.
 In 3 Atk. 215. is a case of
 same name, but is not S. C.

14. In case of two bills filed for the same purpose, one by the principal and the other by his assignees, the court will not stay proceedings in either; but if both be brought to a hearing, the court will dismiss that with costs which was filed improperly. Neither will the court on motion stay proceedings on such grounds, except where several bills are brought by the same person for the same thing, or where bills are brought by several *prochein amies* of an infant for the same thing.

14 Nov. 1763, cor. Henley, C.
Coylgarne v. Jones, Ambl. 613.
Vide Newbury v. Wren, 1 Vern.
 221.

15. A bill was brought by creditors in the court of Exchequer, upon which a decree was made. Other creditors brought a bill in Chancery for the same purpose, and the court decreed the account, &c. saying, the decree in the Exchequer was not complete.

See *Lis pendens*.

Sec. 16. Of Bills by way of Information.

H. 1698, in Scacc.
Attorney-General v. Buckley,
 Parker, 264.
Vide 1 Rol. 768. Cro. Car.
 507. 3 Keb. 292. Hard. 161.
 1 Sid. 131. 2 Sid. 34. 3 Leon.
 215.

1. Information for a penalty abates by the death of the defendant after trial and before judgment; and this may be taken advantage of by suggestion of the death upon the roll, confessed by the Attorney-General, without a writ of error.

M. 1710, in Scacc.
Attorney-General v. Cresner,
 Parker, 279.
Vide Attorney-General v.
 Smith, M. 1705. Attorney-General
 v. Pocock, M. 6 Ann.
 Attorney-General v. Bewis, M. 1707.

2. Information to discover the defendant's stock of pepper: defendant demurred, because it would subject him to a penalty, the year not being past; and demurrer allowed.

H. 1724, in Scacc.
Attorney-General v. Vincent,
 Bunb. 192.

3. Demurrer to an information to discover waste allowed, because forfeitures not waived.

4 Mar. 1748, cor. Hardw. C.
Attorney-General v. Smart,
 1 Vef. 72.

4. The rule that an information for a charity is not to be dismissed, but that there must be a decree for the establishment of the charity holds only in cases of private charities, not where founded by the crown.

23 Feb. 1750, cor. Hardw. C.
Attorney-General v. Scott,
 1 Vef. 418.
Vide Attorney-General v. Par-
 ker, 1 Vef. 43.

5. An information by the Attorney-General is not to be dismissed, though the particular relief prayed is wrong, if the charity wants any directions.

4 July 1751, cor. Hardw. C.
Attorney-General v. Middleton,
 2 Vef. 328.

6. If an information brought to establish a charity prays a particular relief and method of regulation,

gulation, and the party fails in that particular relief, yet that information is not to be dismissed, but there must be a decree for the establishment; and in such cases there is always this distinction, viz. where the charity is at large, or in its nature before the statute of charitable uses, and where it is incorporated by charter under the great seal.

7. In an information for a charity, though the title is mistaken, yet if a right appear it must be established.

10 July 1752, cor. Hardw. C.
Attorney-General v. Breerton,
Breerton v. Tamberlane,
2 Vef. 426.

8. An information was brought against the trustees of Harrow school, grounded on their having expended those monies on the Harrow road, which it was suggested they ought to have laid out on the Edgeware road. As the trustees had a discretionary power, equity would not interpose, unless it were shewn that they had acted corruptly; neither would the court dismiss the information.

26 July 1754, cor. Hardw. C.
Attorney-General v. Harrow
School, 2 Vef. 551.

9. An information for a charity will not be dismissed, if there appear any directions proper to be given, although the prayer be wholly mistaken.

H. 1763, in Scacc.
Attorney-General v. Foyster,
1 Anstr. 116.
Vide *Attorney-General v. Harrow School*, 2 Vef. 551. *Attorney-General v. Smart*, 1 Vef. 72.

10. Where a nuisance and purpresture are committed in a harbour, an information in equity lies to abate them.

T. 1795, in Scacc.
Attorney-General v. Richards,
2 Anstr. 603.

11. Upon an information to have an account taken of what defendant had received as treasurer of the *Philanthropic Society*, defendant filed two insufficient answers, which the court considering as no answer at all, decreed the information should be taken *pro confesso*.

14 July 1796, cor. M. R.
Attorney-General v. Young,
3 Vef. jun. 203.

See *Abatement, Charity, Corporations, Ecclesiastical Persons and Things, Nuisance, Revenue, Schools, Visitor and Visitation Power*.

Sec. 17. Of Bills founded on the *Solet*.

1. **W**HERE a man is entitled to a rent out of lands, and through process of time the remedy at law is lost or become very difficult, the court of Chancery has interfered, and given relief upon the foundation only of payment of the rent for a long time (a), which bills are called bills
N n 2 founded

19 May 1739, cor. Hardw. C.
Benson v. Baldwin, 1 Ask. 598.

(a) The compiler is not able to ascertain for what length of time payment of the rent in such cases must be shewn, and it seems this mode of suit is only to be adopted where a man (having no

title-deeds) claims a right to certain rents which have from time been received by him and his ancestor; and where he can shew no other or better title than to suggest that such rents are *due and belong him*. If, therefore, all the terre-tenants upon the estate are made parties, and the claimant obtains a decree, they will consequently be bound, and it is not likely that any title can then arise which may threaten disturbance to the future possession. In cases somewhat similar in their nature a writ of *scelta ad molendinum* will lie to recover an ancient prescriptive right which one man has to compel another to grind corn at his mill; and it is used where that man leaves the mill and goes to grind his corn at another mill. The writ of *scelta ad molendinum* is a writ of right in the *debet et solet*, and therefore it is that a tenant for life of a manor cannot have this writ. F. N. B. 98.

(b) There is a wide distinction between the application of *debet et solet* and *debet* only. A man uses *debet et solet* where he and his ancestor have enjoyed a certain right until that refusal and denial of the tenant which is the occasion of his present suit; but where the ancestor himself was formerly dispossessed by his own tenant, and the estate thereby discontinued, then the descendant of that ancestor, in order to recover that right, sues in the *debet* alone.

See *Rents and Profits, Fee-Farm Rent, Quit-Rent*: See also *Rent-Charge*.

Sec. 18. Of Bills scandalous and impertinent.

M. 1682, cor. Carleton, J.
Page v. Neale, 1 Vern. 107.
 1 Eq. Abr. 40. pl. 6.

1. A Bill being exhibited to be relieved against a bond of the testator, suggesting, that it was entered into without any consideration, it being only for that the testator had unlawfully kept company with the defendant, and had a bastard by her. A demurrer to that part of the bill was allowed; although it seems by the case to be admitted that a demurrer was not the proper way to be relieved for scandal; but that the bill ought to be referred, and the scandal expunged.

M. 1683, cor. North, C. S.
Tremaine v. Tremaine,
 1 Vern. 187.

2. The bill and answer in a suit between father and son, containing indecent reflections, was taken off the file, on motion, by consent, the cause being compromised.

M. 1719, in Scacc.
Jones v. Langham, Bunb. 53.
Vide post, pl. 5. and note, and *vide post*, pl. 9.

3. It is not regular to refer the bill for scandal after the answer is come in.

T. 1723, cor. Macclesfield, C.
Craven v. Wright,
 2 P. Wms. 181, 182.
 1 Eq. Abr. 68. pl. 2, 3, 4.

4. Where a bill or answer is referred for scandal, and reported to be scandalous, if the Master has once expunged the scandal, the party cannot except, as it will not appear on record what that scandal was; and it was the party's own fault that he did not except to the report sooner.

5. The defendant having answered the bill, cannot afterwards refer it for scandal.

M. 1725, cor. King, C.
Lady Abergavenny v. Lady Abergavenny, 2 P. Wms. 311.

2 *Eg. Abr.* 69. pl. 5.—This was made a rule by Lord King, whereby an old rule of the court of Chancery was altered; but it is held otherwise in Scacc. *Vide Woodward v. Afley*, Bunb. 304. marg. where it is said, that after an answer is come in it is too late to refer the bill for impertinence, but it is never too late to refer it for scandal. *Vide post*, pl. 9.

6. On a motion to discharge an order of reference of the bill in this cause, for impertinence, after the defendant had prayed time to answer, the court ordered the defendant to procure a report within four days, or the order to be discharged.

M. 1728, cor. King, C.
Anon. Mosf. 71.

7. A bill was referred to a Master for impertinence, he reports it pertinent; the defendant excepts generally, without specifying the parts of the bill which are impertinent: the objection was overruled as being irregular; for though the objection was taken in so general a manner, the party may go upon it without pointing out particular passages.

6 May 1747, cor. Hardw. C.
Mackworth v. Briggs,
2 *Atk.* 182.

Lord Chancellor said, suppose for instance from the 20th to the 100th sheet should be entirely impertinent, how could the parties have the benefit of their exception, unless they had couched it in such general terms.

8. It is improper to charge in a bill that a woman had criminal conversation with particular persons, as it would affect the character of strangers, and fill the records of the court with private scandal.

27 July 1742, cor. Hardw. C.
Clark v. Periam,
2 *Atk.* 339.

9. Exceptions were taken to the Master's report, that the bill in this case was impertinent only, the reference being, whether scandalous and impertinent. *Per* Lord Chancellor—Scandal may be taken advantage of at any time; impertinence, not: if reported scandalous, it must be impertinent of course; but it may be impertinent without being scandalous. The single question is, whether these charges referred for scandal and impertinence may be relevant to the merits; and the *majus* or *minus* of the relevancy is not material, which turns on this, whether the plaintiff has any ground for the suit or not; for if relevant, it cannot be said they are scandalous or impertinent; otherwise it would be laying down a rule, that all charges of fraud are scandalous, which would be dangerous, and cannot be the rule; for nothing pertinent to the cause can be said to be scandalous. So in a bill to set aside deeds for fraud, there are often gross charges, which may be as well said to be scandalous as this.

17 Oct. 1750, cor. Hardw. C.
Fenboul v. Passavant,
2 *Vesf.* 24.

This case seems to re-establish the old rule, which was altered by Lord King in *Abergavenny v. Abergavenny*, *ante*, pl. 5. and makes the practice of the two courts of equity again consistent.

10. Plaintiff, a considerable time after answer, obtained an order to refer it for scandal. Lord

12 July 1755, cor. Hardw. C.
Anon. 2 *Vesf.* 631.
Note; If the reference be for

scandal in the defendant's answer the Master usually taxes very large costs; and if it be very scandalous, the Master may tax 100*l.* or more for plaintiff's costs, therefore great care ought to be taken in drawing the bill or answer, that it be not scandalous; and so also in a bill reported impertinent very great costs are commonly taxed. 1 Harr. Ch. Prac. 42.

The court of Exchequer was of opinion, that after an answer is come in it is too late to refer the bill for impertinence, but it is never too late to refer it for scandal. Bunb. 304.

1 Aug. 1764, cor. Northing. C.

Bromfield v. Chichester,

Ambl. 464, 5, 6.

1 *Eq. Abr.* 126.

(a) The cases cited of a reference for irregularity were as follow. *Freeke v. Culpepper,*

29 May 1752. *Knight v. Dekin,* 17 July 1745.

Stevens v. Long, 1 Nov. 1755. *Nugent v. Jones,*

26 July 1759.

Note: The counsel who signed the bill ought of right to pay the costs of a reference for scandal. Harr. Ch. Prac. 42. Rules & Orders of Ch. 93. 1 Ch. Rep. 194.

M. 1787, cor. Thurlow, C.

Fell v. Christ College in Cambridge,

2 Bro. Ch. Ca. 279.

11. If a bill be referred for scandal and impertinence, and be so reported, and exceptions to the report are taken and allowed, plaintiff shall have the costs of the reference; but not in the like event of a reference for irregularity (a).

12. A defendant to a bill, though not served with process, may appear *gratis*, and refer it for impertinence.

See *Answer*, sect. 6.

Sec. 19. Of Bills taken *pro confesso*.

H. 1684, cor. North, C. S.

Johnson v. Desmoneere,

1 *Vern.* 223.

1 *Eq. Abr.* 83. pl. 5.

See this case more fully stated, *post*, tit. *London*; and for an account of this obsolete court, see 43 *Eliz. c.* 12. and 14 *Car. 2. c.* 23.

1. THE court of policies and assurances in *London* having decreed plaintiff's bill to be taken *pro confesso* after the first summons, Lord Keeper reversed the decree, for that the plaintiff had not been fairly summoned according to the statute of 43 *Eliz. c.* 12.

7 June 1684, cor. North, C. S.

Gibson v. Scovington,

1 *Vern.* 247.

2. Defendant having appeared, and afterwards stood in contempt till a sequestration was returned, plaintiff insisted that the bill ought to be taken *pro confesso*. Lord Keeper took time to consider of it till the next term, when it being alledged that baron and feme were defendants, and that it was the wife only who had appeared, and that without the husband's privity, Lord Keeper referred it to a Master to examine the fact, and said, if it should turn out to be so he could not decree against the husband, but the plaintiff must proceed in the sequestration to bring him in, which the plaintiff's counsel observed was but a sorry remedy, in regard that sequestrators upon mesne process were accountable

countable for all the profits, and could retain only so far as to satisfy for the contempts.

3. A defendant refusing to answer, and standing out all contempts to a sequestration, plaintiff moved that the bill might be taken *pro confesso*. Objected, that this could not be done, because the sequestration was neither sealed nor executed, and also because the plaintiff did not produce the original itself, but only a copy of it. Lord Chancellor thought the last objection a good one, but he thought the actual executing of a sequestration to extort an answer, for which the plaintiff has no occasion, very unnecessary.

4. The question in this case was, if a decree shall be absolute or only *nisi*, where the bill is taken *pro confesso* after appearance? Lord Chief Baron and Page, Baron, were of opinion it should be *nisi* only, *hesitantes*. Hale, Baron, was clear that it ought to be absolute. but always absolute. P. 1619, Geale v. Winter, Bunb. 40.

5. Taking a bill *pro confesso* has not been of long standing, it having formerly been the practice to make proof of the substance of the bill, though the defendant stood in contempt to the last process, but latterly the practice has been, that if the defendant appears to a bill, and stands out in contempt to a sequestration, the cause is set down to be heard, and the record of the bill produced and taken *pro confesso*; but if time be given for a defendant to answer, though after the sequestration; and though the answer be reported insufficient, yet the bill shall not be taken *pro confesso*.

report, and his lordship in S. C. further said, that this case is not determined upon satisfactory reasons; for receiving costs upon a Master reporting an answer insufficient is by no means accepting it for an answer.

Vide also Abergavenny v. Abergavenny, 4 Vin. Abr. 446. pl. 1. pl. 5. et post.

6. After a bill is taken *pro confesso*, the defendant is not permitted to answer.

7. Plaintiff brought her bill for an account of profits, &c., and after defendant had fully answered, plaintiff amended her bill three times, to which defendant put in three several pleas and demurrers, which had all been over-ruled, and defendant stood in contempt to a sequestration for not answering the amended bill. Plaintiff now moved for liberty to set down the cause on the sequestration, in order that the bill might be taken *pro confesso*, because part

N n 4

was

P. 1719, cor. Parker, C.
Ann. 10 Mod. 431.

M. 1726, in Scacc.
Howell v. Lord Coningsby,
Bunb. 219.

2 Eq. Abr. 280. pl. 8.

When a cause comes on after the *postea* returned upon the equity reserved, the decree is never *nisi*, P. 1619, Geale v. Winter, Bunb. 40.

M. 1729, cor. M. R.

Hazekins v. Crook,

2 P. Wms. 556.

Mos. 294. 383.

2 Eq. Abr. 178. pl. 4.

See Mr. Cox's statement of this case from Reg. Lib. A. 1729, fo. 453. 2 P. Wms. 559. (n.)

In Davis v. Davis, 2 Atk. 21. Lord Hardwicke said, that *the costs being paid to the plaintiff, on the defendant's answer being reported insufficient, weighed materially with the court in this case, which is a circumstance* Mr. P. Wms. omitted in his re-

W. Kel. 5. 2 Eq. Abr. 179.

P. 1731, in Scacc.

Hughes v. Owen, Bunb. 299.

M. 1731, cor. King, C.
Lady Abergavenny v. Lady Abergavenny,

2 Eq. Abr. 179. pl. 5.

4 Vin. Abr. 446. pl. 1.

W. Kel. 5.

A MS. rep. of S. C. states it thus—I. S. filed a bill against B. to which B. put in answer: the bill was twice amended and discovery of new matter required; B. pleaded and demurred in bar of

such discovery, which being over-ruled, *B.* was in contempt to a sequestration for want of an answer; the sequestration had been executed a year ago, and now plaintiff moved that the bill might be taken *pro confesso*, alleging that by the practice of the court, whenever a defendant has appeared and the process of contempt is carried to the end of the line, the bill may be taken *pro confesso*, or otherwise there would be a failure of justice when a matter is inquired of which lies within the knowledge of the defendant, and of which the plaintiff can have no other discovery but by his oath.—Objected, here was a sufficient answer to the original bill; and no precedent could be produced, that where any part of a bill was answered, the residue might be taken *pro confesso*. But per King, C.—If an action at law be brought for several trespasses, and the defendant's plea goes only to a part, plaintiff may sign judgment as to all the rest; and here *pro tanto* of the amended bill that is not answered; it may be taken *pro confesso*.—But adjourned.—2 Kel. 5. pl. 4. S. C. in *totidem verbis* with MS. rep.—A case was mentioned in Scacc. of the Corporation of *Heiston v. Robinson*, where after an answer reported insufficient, and defendant refusing to put in any further answer, the whole bill was taken *pro confesso*, by the opinion of the whole court delivered seriatim; and this was the opinion of the Master of the Rolls in *Hawkins v. Crook*, for that an insufficient answer is no answer; and it is the party's own obduracy to stand out and refuse making a discovery; and the opinion of taking a bill *pro confesso* quoad some particulars, and joining issue, &c. as to the rest, seems new and introductory of great contention in the proceedings. 4 Vin. Abr. 446. pl. 2. in S. C. Another MS. rep. accord (a) For the decree to take the bill *pro confesso* was reversed. (b) The method in equity of taking a bill *pro confesso* is consonant to the rule and practice of the courts of law, where if the defendant makes default by *nisi dicat*, judgment is immediately given in debt, or in all cases where the thing demanded is certain: but where the matter sued for consists in damages, a judgment interlocutory is given; after which a writ of inquiry goes to ascertain the damages, and then final judgment follows. Said *arguendo* in *Hawkins v. Crook*, 2 P. Wms. 559.

26 Jan 1730, cor. Hardw. C.
Davis v. Davis, 2 Ark. 24.
 8 Vin. Abr. 423. pl. 35:

N. B. This matter was never determined, for the parties agreed to affirm the decree, and their agreement was made an order of court.

was fully answered and denied, and the case of *Hawkins and Crook* was cited. But for plaintiff it was urged, that if defendant by answering part, and refusing to answer the most material point of all, should prevent the bill being taken *pro confesso*, that would put the plaintiff in a much worse condition than not answering at all, and would encourage defendants by this method to elude the justice of the court; and as to *Hawkins and Crook*, defendant there was willing and desirous to put in a full answer, and which was at length the liberty given him by the court (a). Lord Chancellor (King) said, that this is an untrodden path; and as there are no precedents to direct, we must go upon the reason of the thing. At law, after the party has appeared, and is in court, if he makes default (b), judgment is given for the whole demand; and if in trespass, &c. defendant pleads only to part, or says nothing to the residue, the plaintiff may take his judgment immediately for what is not answered; and courts of equity form their process upon the same plan when the party is in court, &c.; and it is a jurisdiction which seems absolutely necessary, and exercised by all courts; when they have the parties once before them, they should have it in their power to determine upon the right, &c., and therefore seemed strongly to incline that the bill should be taken *pro confesso* quoad the particulars not answered: but defendant offering to answer by the next term, except as to matter of account, no order was made upon the main question.

8. In equity a bill taken *pro confesso* when an answer is reported insufficient, is analogous to taking a declaration for true at law, where the plea fails. The proceedings in Chancery are formed according to the course of the civil law in some respects, and the common law in others.

Lord Hardwicke in this case inclined to think that where there is an amended bill, and no answer put in to it, the plaintiff is entitled to a decree *pro confesso*, abstracted from any proceedings in the original cause.

9. The

9. The statute of 5 Geo. 2. c. 25. §. 1. requires, "that (upon affidavit of a person's being gone out of the kingdom to avoid the process of the court) the copy of the order of Chancery directing such defendant to appear at a certain day therein to be named, shall within fourteen days after such order made be inserted in the *London Gazette*, and published on some Lord's day immediately after divine service in the church of the parish where such defendant made his usual abode within thirty days next before his absenting." And Lord Hardwicke in this case observed, that if the minister of the parish prevents its being published, (as the act itself is silent, nor mentions any penalty for his disobedience,) he is indictable for a contempt of the order of the court.

Barnard, 403. The statute of 5 Geo. 2. c. 25. §. 1. empowers the plaintiff to go on as well upon a sequestration for non-appearance as upon a sequestration for not complying with a decree, which till then could not be done in equity. *Vide Davis v. Davis*, 2 Atk. 23. *et vide etiam*, the statute. If a defendant cannot be made to appear, it amounts to the same thing as if process had been taken out for want of appearance and carried on to a sequestration. *Vide Darwent v. Walton*, 2 Atk. 510. *et post*. The statute of 5 Geo. 2. c. 25. extends to bills of revivor. *Vide Anon.* 3 Atk. 690. *et post*.

10. The defendant was brought from the Fleet upon an *alias pluries habeas corpus*, for his contempt in not putting in his answer; and it was now moved that the bill might be taken *pro confesso*, and so ordered. Though the Lord Chancellor at first doubted, whether upon such a personal contempt, as well as where a sequestration goes against a person's estate for not putting in an answer, it should not be put into the paper.

11. Where one defendant is abroad, out of the reach of the court, and cannot be made to appear, it amounts to the same thing as if the plaintiff had taken out process for want of appearance, and carried it on to a sequestration.

The proceedings upon the act of 5 Geo. 2. c. 25. §. 1. for making process in courts of equity effectual against persons who refuse to appear, are as follow: "Upon the defendants not appearing, the court may order the bill to be taken *pro confesso*, and make such decree as shall be thought just; and may thereupon issue process to compel the performance by an immediate sequestration, or by causing the possession of the estate or effects demanded by the bill to be delivered to the plaintiff, or otherwise, as the nature of the case shall require."

Before

21 Jan. 1740, cor. Hardw. C.
Burton v. Mattons, 2 Atk. 114.
Barnard, 401. 2 Eq. Abr.
179. pl. 6. states S. C. nomine
Burton v. Maloon, to this effect,
videlicet: "The opinion of the
Lord Chancellor upon the stat.
of 5 Geo. 2. c. 25. §. 1. was,
that it was not sufficient to
make an affidavit, that the party
making it was informed and be-
lieves that the defendants with-
drew themselves into Ireland in
order to avoid being served with
the process of the court, but it
must likewise be sworn from
whom the party deposing re-
ceived such information," for
was it once allowed that it should
be sufficient to make the affidavit in
such a general manner, the act
would be of the most dangerous
consequence that is possible, Bar-

nard, 403. The statute of 5 Geo. 2. c. 25. §. 1. empowers the plaintiff to go on as well upon a sequestration for non-appearance as upon a sequestration for not complying with a decree, which till then could not be done in equity. *Vide Davis v. Davis*, 2 Atk. 23. *et vide etiam*, the statute. If a defendant cannot be made to appear, it amounts to the same thing as if process had been taken out for want of appearance and carried on to a sequestration. *Vide Darwent v. Walton*, 2 Atk. 510. *et post*. The statute of 5 Geo. 2. c. 25. extends to bills of revivor. *Vide Anon.* 3 Atk. 690. *et post*.

14 July 1741, cor. Hardw. C.
Man v. Parkinson, 9 Mod. 267.

Vide Earl of Lichfield v. Wool-
aston, temp. King, C.

22 Feb. 1742, cor. Hardw. C.
Darwent v. Walton,
2 Atk. 510.

Lord Chancellor in this case observed, that at law if an action is brought against two joint debtors, and one only appears, the creditor may (after going through the whole process to an outlawry) have judgment for his whole debt against the person appearing, and judgment by default against the person who does not appear, (which is all he can do with regard to the latter,) for as to his goods they are forfeited to the crown upon the outlawry.

26 Nov. 1745, Dom. Proc.

Benton v. Vernon,

4 Bro. P. C. 546.

Vide Williams v. Thompson,

2 Bro. Ch. Ca. 279.

10 Nov. 1748, cor. Hardw. C.

Anon. 3 Atk. 690.

In Ch. Rep. 50. is a case of a prisoner in B. R. who refusing to answer it was prayed that the bill might be taken *pro confesso* if he did not answer by a certain day; but the court could not order the bill to be taken *pro confesso*, as the defendant was not in the prison of the court, whereupon he was removed to the Fleet by *habeas corpus*, and a day was given him to answer, but he still refusing, was ordered to be kept close prisoner, and the bill was taken *pro confesso*. So where a defendant is in custody for contempt after appearance, and being brought into court, and hearing the bill read to him, and being required to answer, he obstinately refused. In this case the court ordered the bill to be taken *pro confesso*. *Mof.* 384.

P. 1781, cor. Thurlow, C.

Mawer v. Mawer,

1 Bro. Ch. Ca. 388.

1 Eq. Abr. 83.

Before this act the whole line of process might be carried on to a sequestration (against a defendant who did not appear), but no farther: yet plaintiff might notwithstanding set down the cause against a co-defendant, and have a decree for the whole, as in the principal case, where the defendants were co-partners. If this therefore could be done before the act of parliament, where a person was in the kingdom, but obstinately refused to appear, much more ought the court to make a decree against one partner, where the other is out of the kingdom, that an account should be taken, and that the whole which appears to be due to the plaintiff should be paid by the defendant, the partner who is brought to a hearing; and his Lordship ordered it accordingly.

12. A bill being filed in Ireland against a person resident in England, the defendant appeared, and sued out a commission to take his answer, returnable without delay: but before the answer could be prepared, he was taken ill, and continued so for several months. In the mean time the plaintiff proceeded in taking out the usual process of contempt; and having obtained an order that the bill should be taken *pro confesso*, the cause was heard, and a decree made: afterwards the defendant moved to set aside these proceedings and decree, and that his answer might be received; and upon payment of costs, it was ordered accordingly.

13. The defendant being a prisoner in York gaol, and the demand so trifling that it would not bear the expence of removing him by *habeas corpus* to the Fleet, it was moved, to save this expence, that for want of appearance, the bill in this case (which was a bill of revivor) might be taken *pro confesso*; but the court refused to do it in this summary way. After the act of 5 Geo. 2. for making process in courts of equity effectual against persons who abscond, there was a doubt whether it extended to bills of revivor; but it is now settled that it does. Lord Chancellor therefore on this occasion denied the motion, and left the plaintiff to have recourse to the ordinary remedy.

14. Defendant had been served with a *subpoena*, but had not appeared, plaintiff proceeded to attachment and sequestration. Defendant *non est invent.* and

and had no real or personal estate: on motion that defendant might appear on a day certain, and that the order might be published as directed by 5 Geo. 2. c. 25. to the end the bill might be taken *pro confesso*. It was ordered accordingly.

15. Where the defendant has appeared to, and answered the original bill, if he cannot be found to be served with a *subpœna* to answer the bill of revivor, plaintiff must proceed under the act 5 Geo. 2. to have the bill taken *pro confesso*.

16. Where a defendant puts in an answer after an order that the plaintiff's bill shall be taken *pro confesso*, if the plaintiff except to it, it is a waiver of the process; because the plaintiff shall not have the benefit both of the defendant's answer and of his own allegations. And wherever an order is made to take a bill *pro confesso*, if the defendant comes in upon any reasonable ground of indulgence, and pays costs, the court will attend to his application, if the delay hath not been extravagantly long: but when it hath been so, the mere gratuitously putting in an answer is not sufficient to over-rule the order.

17. Upon an information to have an account taken of what defendant had received as treasurer of the *Philanthropic Society*, defendant filed two insufficient answers, which the court considering as no answer at all, decreed the information should be taken *pro confesso*.

18. A bill for an account was taken *pro confesso* against a surviving executor and devisee in trust; and certain leasehold estates were taken under a sequestration for want of an answer. The court would not order the sequestrator's to sell, but directed them to apply the profits.

In *Maynard v. Pomfret*, 3 Atk. 468. though the sequestration issued as *mesne* process to compel an answer, yet it shall remain if there is any duty to be performed.

19. Where there is only one defendant (a), after all the process of contempt for want of an answer is spent, the bill may be taken *pro confesso*, upon motion under the stat. of 5 Geo. 2. c. 25.

down where there are more defendants than one.

M. 1786, cor. Thurlow, C.
Henderson & al. v. Maggi & al.
2 Bro. Cb. Ca. 127.
Vide Anon. 3 Atk. 690.

M. 1787, cor. Thurlow, C.
Williams v. Thompson,
2 Bro. Cb. Ca. 279.
1 Eq. Abr. 83.

14 July 1796, cor. M. R.
Attorney-General v. Young.
3 Vef. jun. 209.

21 July 1796, cor. Loughb. C.
Shaw v. Wright,
3 Vef. jun. 22.
In *Hales v. Shaftoe*, 1 Vef.
jun. 86. M. R. doubted whether
there can be a sale of goods taken
under a sequestration upon *mesne*
process further than to pay the
expenses.

19 May 1797, cor. Loughb. C.
Seagrave v. Edwards,
3 Vef. jun. 372.

(a) The practice was stated to
be, that the cause must be set
down where there are more defendants than one.

Sec. 20. In what Cases and for what Purposes Bills are retained by the Court.

M. 1713, cor. Harcourt, C.
Lady Hooke v. Grove,
 2 Eq. Abr. 389. pl. 1.
 3 Vin. Abr. 293. pl. 40.

1. A Question arising whether equity would supply the defective execution of a power in the case of a voluntary settlement, Lord Keeper gave the parties leave to try the validity of the execution of the power, and retained the bill *quoad* that question until it was determined at law.

M. 1717, in Scacc.

Anon. Bunb. 17.

Note; Where there is fraud or the matter is complicated, the bill will be retained, though the sum be never so small.

2. A bill for a matter beneath the dignity of the court may be dismissed, as well upon motion as upon demurrer.

M. 1721, in Scacc.

Taylor v. Crompton & al.
 Bunb. 95.

3. Bill for a discovery and account of the quantity of coals dug under the plaintiff's glebe, and for satisfaction, and an injunction to stay the works. The court thought the plaintiff's remedy was at law, but retained the bill until plaintiff had ascertained his title at law.

T. 1727, in Scacc.

Sweetapple v. Duke of Kingston,
 Bunb. 238.

Vide Chamberlain v. Spencer
 and another, 4 Nov. 1731.

4. Bill for tithes, glebe, and right of common. It appearing that the two latter points were proper at law, the court retained the bill until plaintiff had by action ascertained his title, and in the mean time would not decree the tithes.

T. 1727, in Scacc.

Thurkettle & Ux. v. Howorth,
 Bunb. 241.

5. Bill to carry a voluntary deed into execution retained until the plaintiff had tried his remedy at law, where the court said his remedy was plain.

T. 1729, in Scacc.

Poole Corporation v. Bennet & al.
 Bunb. 270.

6. Bill for wharfage and keyage; objected, that plaintiff's remedy was properly at law: the court however would not dismiss the bill, but retained it, that plaintiff might bring his action at law.

1 May 1749, cor. Hardw. C.
Sayer v. Pierce, 1 Ves. 232.

7. Bill for an account of coals dug, and to ascertain the boundaries between the plaintiff's and defendant's leasehold collieries. The court would not decree the account unless the plaintiff shewed possession; the bill therefore was retained, with liberty for the plaintiff to bring his ejectment at law.

28 June 1750, cor. Hardw. C.
Sands v. Sands, 1 Ves. 495.

8. A bill was retained for a year, with liberty to bring an ejectment. A verdict was given for defendant.

defendant. The judge before whom the ejectment was tried certified that though he did not think the verdict was against evidence, the weight of evidence was with plaintiff. On application by plaintiff for leave to bring a new ejectment, it was granted, and he obtained a verdict. Plaintiff then set down his cause. Plaintiff having got possession, defendant brought a new ejectment without leave, and then moved to put off the hearing till his ejectment was determined. Lord Chancellor said, it was irregular to bring an ejectment without leave, but as there was verdict against verdict in this case, his lordship excused the irregularity.

9. On a bill brought to set aside a will on the ground of the testator's being a papist, an issue was directed to try whether he was from the age of twelve years, or from any other, and what period of time, constantly bred up in the protestant religion, or not; but on an appeal the decree was reversed, and the bill was retained for twelve months, with liberty for the plaintiff to bring an action at law, upon any title which he might have under the popery acts.

9 Feb. 1767, Dom. Proc.
Hobson, an Infant, v. Mead, Clerk.
6 Bro. P. C. 197.

10. And in a similar case, the plaintiff having neglected to bring his action within the time limited by the decree, the court dismissed the bill with costs.

14 Dec. 1767, Dom. Proc.
O'Grady, Esq. & al. v. Lord Kinjale & al.
6 Bro. P. C. 284.

11. Bill for rent of a mine, which depended upon the measure of a stack of coal, retained for a year, that the plaintiff might try an issue as to the quantity constituting a stack by the custom of the country.

P. 1786, cor. M. R. abf. C.
Grach v. Barker,
2 Bro. Cb. Ca. 61.

12. Bill for a fee-farm rent retained for a year, that plaintiff might try his title at law.

P. 1788, cor. M. R.
Duke of Leeds v. Corporation of New Radnor,
2 Bro. Cb. Ca. 338. 1 Eq. Abr. 364.

13. But such retainer was held to admit the equitable right, and draw after it an account.

H. 1789, S. C. on Appeal,
2 Bro. Cb. Ca. 518.
Vide Finch, 241. Duke of Bridgewater v. Edwards, 4 Bro. P. C. 139. Holder v. Chambury, 3 P. Wms. 256. Lord North v. Countess of Strafford, 3 P. Wms. 148. Berkley v. Earl of Salisbury, 1 Ch. Ca. 121.

14. Bill to have a voluntary deed delivered up dismissed: cross bill to execute it retained for a year, with liberty to sue upon a covenant in the deed.

M. 1789, cor. Thurlow, C.
Colman v. Sarrel,
3 Bro. Ch. Ca. 12.
1 Vef. jun. 50.
Vide Williamson v. Coddington, 1 Vef. 154.

15. Bill by next of kin for personal estate secured by mortgage given to a charity. The will was dated

H. 1793, cor. M. R.
Pickering v. Earl of Stamford,
4 Bro. Cb. Ca. 214.

dated in 1754. No bill was filed till 1792, yet his Honor would not dismiss the bill, but retained it, and ordered a reference to the Master to inquire into circumstances.

H. 1794, in Scacc.
Cowet v. Armitage,
2 *Anstr.* 412.

16. An uncertificated bankrupt filed a bill without the assignees being parties. On circumstances which raised a doubt as to the validity of the commission, the bill was retained, with liberty to add parties.

See more under *Answer*, *Demurrer*, *Equity*, *Intjunction*, *Practice*, *Plea*, *Publication*, *Relief*, *Replication*.

GENERAL REFERENCES.

Bidder—see *Sale*, *Purchase* and *Purchaser*, *Revenue*.

Bills of Exchange—*Trade*.

Sec. 1. In what Cases Equity will wholly set aside a Bond as unreasonable, unjust, or for unlawful Consideration.

M. 1686, cor. Jeffries, C.
Traitor v. Traitor, 1 *Vern.* 413.
1 *Eq. Abr.* 88. pl. 2.

1. A Son differing with his mother settles his mansion-house on his brother, but first takes a bond from him in his sister's name, that he should not permit his mother to come into the house. The bond was set aside as against the law of nature.

T. 1689, cor. Lds. Comrs.
Key v. Bradshaw, 2 *Vern.* 102.
1 *Eq. Abr.* 89. pl. 6.

2. A bond was given in common form for payment of money; but the agreement was proved to be, that the obligor should marry such a man, or pay the money in the bond. The court ordered the bond to be delivered up, for marriage ought to be free.

H. 1690, Canc.
Baker & Un. v. White & al.
2 *Vern.* 215.
1 *Eq. Abr.* 89. pl. 6.

3. A., a widow gave a bond conditioned to pay B. 100*l.* if she should marry again, and B. gave her a bond to pay her executors the like sum if she did

did not marry again during life. *A.* married soon after; her bond was decreed to be delivered up.

4. Bill by executor to avoid bonds given by the testator, suggesting they were gained by threats and undue means. The defendant by answer says, they were given for money lent and debts due. It appeared by the proof that defendant was a common harlot, and that the testator had unlawful conversation with her. *Per cur.*—Though this was not laid in the bill, yet it was sufficiently put in issue by the defendant's answer, which said the bonds were given for money lent. Where the party himself that is culpable comes for relief against such bonds, the court may refuse, otherwise where his executor comes. Decreed, that on payment of what was actually due for money lent the bonds should be delivered up.

M. 1690, Canc.
Matthew v. Hanbury & Ux. & al.
2 Vern. 187.
Vide Bainham v. Manning,
2 Vern. 242.

5. One settled land on his daughter in tail, and took a bond from her not to commit waste. An idle bond, and decreed to be delivered up.

Vide Pool's case, cited in Tatton and Molineux, Mo. 809, 810. where a recognizance conditioned that tenant in tail should not suffer a recovery, was decreed to be delivered up as creating a perpetuity.

Vide also Freeman v. Freeman, 2 Vern. 233. where a father settled lands on his son in tail, and took a bond that he should not dock the entail. Decreed a good bond, for the father might have made his son tenant for life only.

H. 1691, Canc.

Jervis v. Bruton,

2 Vern. 251.

1 Eq. Abr. 87. pl. 8.

6. A bond given for money fraudulently won at gaming. Decreed to be delivered up.

Note 3 Though the sum lost was less than what was prescribed by the statute, yet equity gave the same relief as had been given before the statute was made.

M. 1698, Canc.
Humphries v. Rigby, 2 Freem. 223.
2 Eq. Abr. 184. pl. 2.

7. Testator directed his nephews, legatees of his personal estate, to give bonds to each other, that in case either should die without issue of his body, he would leave the whole to the survivors. Equity refused to decree that such bonds should be entered into, being an attempt to entail a personality.

T. 1703, Canc.
Williams v. Williams,
1 Eq. Abr. 207. pl. 9.
A personal estate cannot be entailed, *vide Seale v. Seale*,
1 P. Wms. 290. Prec. in Ch. 421.
and the cases there referred to.

8. The captain of a ship, on an outward-bound voyage, takes bonds from his seamen to himself in 200*l.* penalty, conditioned, that they shall not demand any wages until the ship arrives in the port of London. The ship is lost, and the seamen sue the captain for their wages. Held, that those bonds were unjust, and void in law.

12 Feb. 1704, Dom. Proc.
Buck v. Rawlinson,
1 Bro. P. C. 102.

9. *J. S.* had an extravagant wife, who being in trade contracted a debt of 250*l.* with her mistress, part of which debt she requested the mistress

H. 1707, cor. Cowper, C.
Fowler v. Ayliffe,
2 Eq. Abr. 185. pl. 4.

strefs would conceal from her husband. The femstrefs applied to the husband, and receiving that part of the debt which it was agreed she should discover, she gave the husband a receipt in full. Afterwards the wife prevailed on her husband's niece to join her in a bond to the femstrefs for the residue of the debt, which she did to the extent of 125*l.*, and then discovering the contrivance, she brought her bill to be relieved against the bond. Lord Chancellor thought the receipt from the femstrefs to the husband a sufficient discharge of the debt at law, and set aside the bond.

M. 1731, cor. Jekyll, M. R.
Ofmond v. Fitzroy and another,
 3 P. Wms. 129, 130.
 2 Eq. Abr. 186. pl. 8.
 See this case again stated with
 notes, *post*, tit. Fraud, Heir.
Vide etiam post, f. 10.

10. A father entrusts his heir apparent, then an infant, to the care of a servant: the heir comes of age; the servant takes a bond from the heir, which is secreted from the father, and the heir has not wherewithal to pay the bond. Equity will set aside the bond, as obtained by fraud and a breach of trust.

But where a weak man gives a bond, if it be not attended with fraud or breach of trust, equity will not set aside the bond only for the weakness of the obligor, if he be *compos mentis*.

7 July 1741, cor. Hardw. C.
Clarke v. Periam, 9 Mod. 340.
 2 Atk. 333. 337.
Vide Lord and Lady Donerail,
 in Dom. Proc. 1735.
Sidney v. Sidney,
 3 P. Wms. 269.
Cox v. Robinson, 9 Mod. 263.
Whaley v. Norton,
 1 Vern. 483.

11. Bill to establish an annuity-bond given to the plaintiff as *premium pudicitie*. Cross bill to deliver up the bond, alledging that she was a common prostitute. Objected, that the charge against her in the cross bill should be confined to general character, and not to particular instances of lewdness of which proof was attempted to be made. Lord *Hardwicke* thought this objection of great consequence to the practice of the court, and took time to consider of it. But his lordship afterwards, on the rehearing, proposed the bond should be cancelled; and by consent a perpetual injunction was awarded against the bond.

10 June 1749, cor. Hardw. C.
Robinson v. Gee, 1 Ves. 254.

12. Testator gave a bond *ex turpi causa*, and by his will made an equal provision for the obligee. The bond, as against creditors, was set aside by the court; and the consideration of the legacy was reserved as a matter of contest between the obligee and the executor of the obligor.

7 July 1749, cor. Hardw. C.
Debenham v. Ox, 1 Ves. 276.

13. Bill for delivering up a bond given by plaintiff to defendant's wife, as a reward for her power and influence over plaintiff's grandfather, (an old man of 82,) that he should dispose of his whole estate for plaintiff's benefit, and give security that he

he would not alter his will so made. *Per* Lord Chancellor—This bond is new in specie, and differs from marriage-brochage bonds and bonds in fraud of marriage-agreements; yet being given for an undue consideration, it must be delivered up; for it can receive no countenance in equity. But as to the costs, Lord Chancellor would not award them, the plaintiff himself being *particeps criminis*.

See more, *post*, sect. 4. sect. 11.

As to bonds given by men to their mistresses *pro turpi causâ, aut in premium pudicitie*; and the order and priority which shall be observed in regard to such bonds, in case of the death of the obligor, see *Executors and Administrators, Seduction*.

Sec. 2. Cases in which the Court cannot wholly set aside a Bond, but will yet give partial Relief against the Penalty.

1. **A**N officer in the army agreed to surrender his commission to *J. S.* in consideration of 100*l.*, for which *J. S.* gave his bond. The officer surrendered, but the Duke of *Ormond* refused to let *J. S.* have the commission. The court would not relieve *J. S.* against this bond, save only against the interest and costs.

A case was cited where *A.* agreed to surrender his office to *B.* for 100*l.*, for which *B.* gave his bond. *A.* surrendered, but admittance was refused to *B.* as not being qualified; *B.* had no relief against this bond.

2. Bill to be relieved against four bonds entered into by plaintiff's testator to defendant for quitting his pretence, and procuring plaintiff to be admitted purser on board a man of war. The court could not set aside the bonds, but relieved on payment of the 400*l.* principal, without interest or costs.

3. *Elizabeth* the wife of *Duval* entered into a bond for 140*l.* penalty, conditioned for payment of 72*l.*, on 20th April 1676. When the bond was put in suit, *Duval* and wife pleaded *solvit ad diem*, after issue joined on a defect in evidence, a bill in equity was filed, suggesting that the bond was obtained by fraud, and was without consideration.

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ation,

M. 1682, cor. Finch, C.
Berresford v. Done,
2 Vern. 98, 99.
1 Eq. Abr. 35. pl. 2.

H. 1693, Cane.
Symonds v. Gibson, 2 Vern. 308.
1 Eq. Abr. 85. pl. 3.
Note; No other circumstance appears on the reporter's statement of this case. *Vide Berresford v. Done*, 1 Vern. 98.

20 Mar. 1694, Dom Proc.
Duval & Ux. v. Terrey,
Show. 15. P. C.
Vide Hale v. Thomas,
1 Vern. 350.

ation, and praying a discovery. Chancery decreed, that the defendants at law should not be relieved, save against the penalty of the bond, and referred it to tax the costs at law and in equity, and that what the Master reported to be due for principal interest, and costs, should be paid on 20th October following. This decree affirmed *in toto* by the Lords.

29 June 1739, cor. Hardw. C.
Walmsley v. Booth,
2 Atk. 25. Barnard. 475.

On the rehearing Lord Chancellor did not regard the knavish character of Crook, but the circumstances of distress under which he gave the bond; the court could not permit any one to take advantage of another's necessity, wherefore decreed for the plaintiff.

4. *Japhet Crook* in 1728, being under a prosecution for perjury and forgery, employed the defendant as his attorney to get bail, which he did accordingly; and during this transaction drew *Crook's* will, who directed a legacy of 1000*l.* to the defendant, and 500*l.* a-piece to the bail; and afterwards the defendant got a bond for the security of his legacy. *Crook* afterwards revoked this will, and by another appointed the plaintiff executrix, and made her residuary legatee. After the death of the testator, the defendant brought an action on his bond, and had a verdict and judgment. Bill to be relieved against it for fraud. *Crook* living six years after giving the bond, and not attempting to be relieved, Lord *Hardwicke* decreed for the defendant on the first hearing; but on the rehearing reversed his former decree, being thoroughly convinced it was wrong.

A man may reward his attorney after the suit is over if he thinks fit. Willf. 291. 2 Vef. 138. 260.

An attorney ought not to take a bond for services; but if a client with his eyes open will give one of his own accord, it is not absolutely void.

6 Nov. 1740, cor. Hardw. C.
Spurrett v. Spiller,
1 Atk. 105.

Vide Summer v. Brady, 1 Term Rep. C. B. 647. *Middleton v. Lord Onslow*, 1 P. Wms. 768. *Smith v. Bromley*, Dougl. 3 ed. 696. *Jones v. Barkley*, Dougl. 696. *Cockshot v. Bennett*, 2 Term Rep. 763. *Vide Lewis v. Chase*, 1 P. Wms. 620. *contra*.

5. *A.* being upon an agreement for a composition, gives one of his creditors, who would not consent to it otherwise, a bond for the residue, over and above his composition. Such a contract, though not void by the express words of 5 *Geo.* 2., seems to be within the reason and design of this act.

5 June 1741, cor. Hardw. C.
Roy v. Duke of Beaufort,
2 Atk. 190.

6. A bill was brought for relief against a judgment on a bond, in which the plaintiff was jointly bound with his son in the penalty of 100*l.* that the son should not commit any trespass in the Duke of *Beaufort's* royalty, by shooting, hunting, fishing, &c. except with the licensee of the gamekeeper, or in company with a qualified person. The son having caught two flounders with an angling rod, the bond was put in suit, and judgment for the penalty, &c. The gamekeeper's brother-in-law and another servant of the Duke's asked

asked the plaintiff's son to angle with them, when he caught the two flounders, and the verdict was found merely on their evidence. Lord *Hardwicke* decreed the plaintiff should be relieved against the verdict, and that the Duke should refund the 100 *l.* recovered on the bond, and the 40 *l.* costs of suit.

Bonds for the preservation of game and to prevent poaching, are not only for the benefit of the lords of manors but for those also who enter into them, for that sort of idleness leads to worse consequences.

The present act of the son is not *malum in se*, and there is no statute which directs the taking of such bonds to prevent the like offences for the future, as in the case of deer-stealing, or the statutes which relate to the customs, and which direct and command the taking of such bonds.

7. A bond payable by instalments, the obligee upon a breach of payment of the first instalment gets judgment for the whole penalty. On payment of the money due and costs, even a court of law will act equitably, and relieve the obligor.

20 Oct. 1744, cor. Hardw. C.
Ex parte Grooms, 1 Atk. 118.

8. A bond was given by the plaintiff to the defendant, who was a hair merchant, as a security for plaintiff's service and behaviour in *Flanders*, as an agent for the defendant, in buying hair there; and as a further security for the performance of the agreement, he deposited 100 *l.* in the defendant's hands. He bought only 5 *l.* worth of hair, and returned to *England* before the time agreed. It was insisted for the defendant, that he had a right to detain the 100 *l.*, as the stated damages between the parties. *Per Lord Hardwicke*—The penalty cannot be decreed, because the present is a bond for *services only*, and different from a *nomine poene in leases* to prevent a tenant from plowing.

26 Nov. 1746, cor. Hardw. C.
Benson v. Gibson,
3 Atk. 395.

So where a person is guilty of a breach of a bond given as a security not to defraud the revenue, equity will not relieve against it, because it is considered in law as a crime.

In the principal case the court can only direct an action at law upon a *quantum damnificatus*, to try how far the defendant has been damaged.

Vide Roy v. Duke of Beaufort,
2 Atk. 190.

Note; This cause was compromised by the recommendation of Lord *Hardwicke*, and defendant paid back 90 *l.* of the deposit. No costs on either side.

18 July 1750, cor. Hardw. C.
Earl of Chesterfield & al. v.
Janssen, Bart.

1 *Atk.* 301. to 355.
 2 *Ves.* 125.

See this case fully stated, *post*,
 tit. *Heir*, catching bargains.

See also *Fraud*, *Post obit*, *Usury*.

(a) Lord Chancellor said, that
 as bargains not cognizable at law
 are proper subjects for equity, new
 agreements and new terms may
 confirm what at first was doubt-
 ful.

T. 1788, cor. M. R. abf. C.

Errington v. Aynsly,

2 *Bro. Ch. Ca.* 343.

His Honor remembered the case
 of Lord Kilmorey v. Thackery
 in Scacc. which was an agreement
 to prevent the bed of a river from
 breaking its bounds. In that case
 the court said they could not de-
 cree a specific performance in ge-
 neral cases, but that permitting
 the river to break its bounds was
 permission of waste. A specific
 performance is only decreed where
 the party wants the thing in *specie*,
 and can have it no other way.
 Specific performance will not be
 decreed of an agreement to build
 a house, because if *A.* will not
 build it, *B.* may.

9. Defendant advanced to plaintiff's testator
 5000*l.* on a *post obit* bond payable on the death of
M. The testator survived *M.*, and then cancelling
 his *post obit* bond, gave defendant another bond (a)
 for double the sum, with interest at 5 *per cent.*, ac-
 companied by a judgment, which was entered up
 accordingly. The testator after making two pay-
 ments of 1000*l.* each died, charging his estate by
 will with the payment of his debts, and leaving the
 plaintiffs his executors. They brought a bill to
 set aside defendant's demand as an unconscientious
 bargain and usurious contract. The court relieved
 against the penalty of the last-mentioned bond and
 judgment, by directing the defendant to deliver up
 the bond to be cancelled, and to acknowledge satis-
 faction on the judgment, on payment of what
 should be due at law.

10. Plaintiff contracted with the justices of *N.*
 to build a bridge and support the same for seven
 years, and at the same time entered into a bond to
 perform the articles. He built the bridge, and the
 consideration money was paid to him. The bridge
 was soon after (*viz.* within a year) carried away by
 a flood. Plaintiff being advised that no bridge
 could stand on that site, refused to rebuild it,
 whereupon the justices brought an action on the
 bond, and plaintiff filed his bill for an injunction
 against the proceedings on the bond, and that an
 issue *quantum damnificatus* might be directed, which
 was decreed accordingly, in regard the sum men-
 tioned in the bond was only a penalty.

See more *post*, tit. *Penalty*.

Sec. 3. In what Cases a Bond shall be binding in Equity, and Relief abso- lutely denied to the Obligor or his Representatives.

18 Nov. 1687, cor. M. R.

Waley v. Norton & al.

1 *Vern.* 483.

(a) His Honor observed that
 nothing in this case appeared but
 a free gift; there was no *turpis*
contractus, and even if it had been
 so we know that *Adam* was pun-
 ished though tempted by *Eve*,
 because he would be tempted.

1. Plaintiff had given a bond for 400*l.* to de-
 fendan, who was his mistress. Defendant
 by answer admitted, that there was no pecuniary
 consideration for the bond, but that it was a free
 gift. No *turpis contractus* was proved (a), nor
 was it in evidence that defendant was a common
 strumpet. The court would not relieve the plain-
 tiff,

tiff, but gave him leave to amend his bill, and charge any special matter of defendant's prostitution before she lived with him.

Note; If the obligor of a bond given to a common harlot, for unlawful consideration, applies to this court, equity will not relieve him; but if his executor impeaches the bond it may vary the case.

2. A man settled land on his son in tail, and took a bond from him that he should not dock the entail. On a bill to be relieved against the bond, it was decreed to be good; for if the son would not have given the bond, the father might have made him only tenant for life.

T. 1691, Canc.

Freeman v. Freeman,

2 Vern. 233.

Shortly stated in *Préc. in Cb.* 28.

1 *Eq. Abr.* 87. pl. 9.

Vide Jervis v. Bruton, 2 Vern. 251.

3. Bond given by a man to his housekeeper for secret service. Equity would not relieve against it. *Secur.* if the bond had been given to a common strumpet.

M. 1691, Canc.

Bainton v. Manning,

2 Vern. 242.

Vide Matthew v. Hanbury, 2 Vern. 187.

4. Defendant being a captain of marines, agreed to sell his commission to plaintiff for 600*l.*, and to procure plaintiff to be appointed in his stead by a certain day. Plaintiff gave a bond for performance of the agreement, accompanied by a warrant of attorney, upon which judgment was entered up at law against plaintiff for the purchase-money. Defendant afterwards refused to accept the commission, and scrupled to take the oath required of commission officers by 7 *W. & M.* (a). Held, the plaintiff must pay the money, and not reliev-
(b) able in equity (b).

T. 1702, cor. Wright, C. S.

Ive v. Ash, *Préc. in Cb.* 199.

2 *Eq. Abr.* 242. pl. 8.

Collet's P. C. 267.

4 *Vin. Abr.* 406.

16 *Vin. Abr.* 129.

(a) This decree was affirmed in parliament, and it was there held that officers of marines were not within the statute of 7 *W. & M.* that statute extending only to horse, foot, and dragoons.

(b) Lord Keeper compared this case to a bond *pro cassamento* * et *favore*, which if reduced to a judgment is not avoidable at law or reliev-
able in equity.

* *Easfamento*, from *Aisfamentum*, is an obsolete word used by *Spel.* 27. and signifies *Easement*, which is a service that one neighbour hath of another by prescription or otherwise, without profit, as a right of way, sink, sewer, &c.: it is commonly used in leases for years, as one of the general appurtenant words of a demise. *Vide Kitch.* 105. 100. *Jacob's Law Dict.* tit. *Easement*. *Vide Berresford v. Done*, 2 Vern. 98, 99. a case of a sale of a commission in the army, which the commander in chief refused to confirm. Defendant there was not relieved against the penalty, but only against interest and costs. *Vide Law v. Law*, 3 *P. Wms.* 392. *Bellamy v. Burrow*, *Ca. temp. Talb.* 97. *Purdy v. Stacey*, 3 *Burr.* 2698. *Harrington v. Du Chastel*, 1 *Bro. Ch. Ca.* 124. *Debenham v. Ox*, 1 *Vesf.* 276. *Morris v. McCulloch*, *Ambl.* 432. *Garforth v. Fearon*, 1 *Term Rep. C. P.* 327. *Parsons v. Thompson*, 1 *Term Rep. C. P.* 322. which are cases of relief, though subsequent to 5 & 6 *Edw.* 6 against the sale of offices.

5. An estate was devised to the eldest son, provided he or his heirs pay 100*l.* a-piece to his three daughters at 21 or marriage. One daughter dies before 21, unmarried. After, T. S. buys the estate; and thinking it subject to the deceased daughter's portion, (a bill being brought for it,) gave a bond to her executor to pay it; and being afterwards advised that the land would not be liable, he brings a bill to be relieved against it. Held by Lord Keeper, that though by the present law the land would not be liable to the portion, yet

M. 1702, cor. Wright, C. S.

Smith v. Avery,

1 *Eq. Abr.* 269. pl. 9.

perhaps when the bond was given it might have been otherwise; and there being no fraud in getting the bond, his lordship would not relieve against it.

T. 1709, cor. Cowper, C.
Goodman v. Scufe,
 2 *Eq. Abr.* 183. pl. 2.
Vide S. C. post, sect. 10. and
 the cases there referred to.

H. 1710, in *Scacc*:
Rex v. Tale, *Bunb.* 58.

6. Where a man under fear enters into an engagement, and afterward, when at liberty, ratifies the same by a bond and judgment, equity will not relieve him.

7. A bond taken in the name of the crown by the cashier of the excise, for payment of money to the crown, and on his own private account, is good, though the cashier was not a commission-officer.

P. 1720, cor. Parker, C.
Lewis v. Chafe, 1 *P. Wms.* 620.
 2 *Eq. Abr.* 125. pl. 5. 185. pl. 5.
 The authority of this case is
 expressly contradicted. *Per Cur.* C. B. in *Summer v. Brady*, 1 *Term Rep.* C. B. 647. and indeed it
 seems inconsistent with the spirit of many other cases, as *Middleton v. Lord Onslow*, 1 *P. Wms.* 768.
Spurrett v. Spiller, 1 *Atk.* 105. *Smith v. Bromley*, *Dougl.* 3d. edit. 696. *Jones v. Barkley*. lb.
Cockshott v. Bennett, 2 *Term Rep.* 763.

8. Equity will not relieve against a bond given by a bankrupt to induce a creditor to withdraw his petition against the certificate.

26 Oct. 1744, cor. Hardw. C.
Ex parte Burton, 1 *Atk.* 255, 256.

9. *Stephens*, formerly a trader in *Holland*, fails there, upon which there was a *cessio bonorum*; he comes to *England*, and is appointed a governor abroad; he applies to one *Burton* to be his security to the company, and to advance him a sum of money, who agreed to it, provided *Stephens* would give him a bond that should comprise the remainder of an old debt due before the *cessio bonorum*, as well as the further sum advanced, which was accordingly done: *Stephens* afterwards becomes a bankrupt; and the commissioners doubting if *Burton* ought to be admitted a creditor for the whole money, he now petitioned for that purpose. Lord Chancellor, on the circumstances of the case, of opinion he was entitled to be admitted a creditor for the whole money upon this bond.

If a debtor cleared under the insolvent acts, afterwards gives a bond for the residue of the old debt, this will be binding upon him.

Lord Chancellor seemed to think, if a bankrupt after his discharge applies to an old creditor to lend him a new sum of money to carry on his trade, or to be his security for any office, this would be a good consideration for his giving bond for the remainder of the old debt, and the whole may be proved under a second commission.

26 Nov. 1746, cor. Hardw. C.
Burton v. Gibson, 3 *Atk.* 395.

10. Lord *Hardwicke* in this case said, that where bonds are given as a security not to defraud the revenue,

revenue, and a person is guilty of a breach of such bonds, it is considered in law as a crime, and equity will not relieve.

11. If a wife having an estate to her separate use, borrows money, for which she gives her bond, this is a sufficient foundation to demand the money against her out of her separate estate, and her declaration may be read in evidence.

27 Feb. 1757, cor. Hardw. C.
Peacock v. Monk, 2 Vef. 193.

Sec. 4. Of voluntary Bonds, and such as are fraudulent against Creditors: And herein of the Order and Priority which shall be observed with respect to them in the marshalling of Assets.

1. **A** Voluntary bond by the husband after marriage to make a jointure on his wife; he makes a jointure, and the wife gives up the bond; the jointure is evicted; the widow (there being no other debts) shall have her jointure made good out of the personal estate; and the giving up of the bond by the wife, during her coverture, shall not bind her.

H. 1686, cor. M. R.

Beard v. Nuthall, 1 Vern. 427.

1 Eq. Abr. 221. pl. 6.

The plaintiff was also entitled to dower, to recover which she was left at liberty to proceed, and what the dower should fall short in value of the jointure should be retained by her out of the value of the estate, notwithstanding the bond was delivered up. For an agreement, though voluntary, under hand and seal, ought to be decreed in equity.

2. *A.* executed a voluntary bond of 5000*l.* to one of his daughters, without any condition, payable immediately; but always kept it by him; and it was proved to be made to screen himself from taxes, and so esteemed by that daughter. *A.* by will gave portions to all his daughters, and died; this bond decreed to be set aside.

H. 1701, cor. Wright, C. S.

Ward v. Lant,

Prec. in Ch. 182.

Lord Keeper said, that testator, with respect to the bond in question, could only be considered as a trustee for himself.

3. A voluntary bond shall not be paid in a course of administration so as to take place of real debts, though by simple contract; but such voluntary bond shall be paid before legacies (a).

23 Feb. 1712, cor. Harcourt, C.

Jones v. Powell,

1 Eq. Abr. 84. pl. 2.

(a) For the bond, although it be voluntary, transfers a right in the lifetime of the obligor; but legacies arise from the will, which takes effect only from the testator's death, and therefore ought to be postponed to a right created in the testator's lifetime; which, said Lord Chancellor, was expressly proved by the case of Fairbeard and Bowers, 2 Vern. 202. *Prec. in Ch.* 17. *Vide also* *Cray v. Rooke*, Ca. temp. Talb. 153.

4. A man on the marriage of his wife's daughter to whom he was indebted, but not to the value of the portion expected by the intended husband, makes him a verbal promise to pay him 4000*l.*, and pays all but 1500*l.*, and some time after seals a bond to the husband for the 1500*l.*, and shews it,

T. 1713, cor. Harcourt, C.

Loftes v. Lowry,

Prec. in Ch. 370.

2 Eq. Abr. 256. pl. 5.

Gilb. Eq. Rep. 32.

1 Eq. Abr. 156. pl. 8.

Gilb. Ch. 297.

Vide *Oxley v. Lee*, 1 Atk. 625.

it, together with his will, to the husband, but does not deliver it, but keeps it by him till his death, and then it is found with his will. He has several creditors by simple contract, who take out administration; and the husband becoming a bankrupt, his creditors exhibit their bill to have the benefit of the bond. Lord Chancellor decreed that this bond should be looked upon as voluntary, not being made in pursuance of any obligation in writing on the marriage, nor put into the power of the husband, and therefore fraudulent and void *quoad* the creditors, even upon simple contract, but good against any legacies, because a voluntary contract in the life of the testator is prior to the will.

H. 1719, cor. Parker, C.
Blackburn v. Edgley,
1 P. Wms. 607.

(a) The court in this case did not determine what should be construed a coercion; the father only said, "if his son would not execute the bond he might let it alone," which may be interpreted a threat or not; but it seems the son of his own free accord executed the bond in the absence of his father, and there was nothing in proof to impeach the bond.

T. 1725, cor. King, C.
Wife's case, Sel. Ca. in Chan. 46.
2 Eq. Abr. 483. pl. 24.
Vide Ex parte Hill, Cooke's
B. L. 282.

5. A son in plentiful circumstances gives a bond to pay his father 120*l.* *per ann.* for life. This is good if done without coercion. *Sed quare*, what amounts to coercion (a)?

6. A. intending to marry B., gave a bond to B.'s father for 500*l.*, payable at a certain day, (defeazanced not to be put in suit,) but to remain as a security for the daughter; and in case any misfortune should happen to A., to be paid before other creditors. This is a fraudulent bond on the face of it to disappoint creditors.

17 Nov. 1730, cor. Jekyll, M. R.
Williams v. Sawyer & al.
Sel. Ca. in Ch. 6.
2 Eq. Abr. 182. pl. 4.

7. Where a voluntary bond is given by the husband to trustees for his wife's benefit, equity will postpone such bond even to the debts on simple contracts, but will admit it to be paid before legacies.

M. 1733, cor. Jekyll, M. R.
Lechmere, Esq. v. Lord Carlisle
and others, 3 P. Wms. 222.

8. Any voluntary bond is good against the executor, though to be postponed to a simple contract debt.

M. 1734, cor. Jekyll, M. R.
Lady Cox's case, 3 P. Wms. 339.
2 Eq. Abr. 182. pl. 6.
258. pl. 13.

This case in Lib. Reg. 1734,
fo. 113. *nomine North v. Cox.*
Vide Marchioness of Anandale
v. Harris, 1 P. Wms. 432. Wal-
ker v. Perkins, 3 Burr. 1568.
Priest v. Parrott, 2 Vef. 160.

9. A. having a wife, (who lived separate from him,) and afterwards courted and married another woman who knew nothing of the former wife's being alive; but it being discovered to the second wife that the former was living, A., in order to prevail on the second wife to stay with him, some years afterwards gave a bond in trust for the second wife to leave her 1000*l.* at his death, and died not leaving assets to pay his simple contract debts. *Decreed*, that this bond, as it was given on an illicit consideration,

consideration, and consequently worse than a voluntary bond, should be postponed to all the simple contract debts, though had it been given immediately on the discovery that the first wife was alive, and they had parted thereupon, it had been good, as given on a just consideration.

10. *A bond given to a kept mistress for the payment of an annuity of 80l, for the maintenance of herself, and provision for a child she had by the obligor, shall not be set aside in favour of his legitimate children or heir, if not obtained by fraud.* But the annuity was decreed, *per* Master of the Rolls, to be paid even after simple contracts, this being a voluntary bond; and that in that course of payment a fund should be set apart out of the personal estate; but his Honor having given no direction whether the real estate should be chargeable in case of a deficiency of the personal assets, on appeal, Lord C. Talbot held the real estate liable in case of a deficiency in the personal estate; and decreed, *that if the same should fall short*, upon payment of the arrears and growing payments by plaintiff, (the heir,) and that upon his securing the annuity out of a sufficient part (of the real estate *) when of age, the obligee be restrained from proceeding upon the bond at law.

where the parol must demur till the heir (now three years old) comes of age, would be delaying her much too long. And since even after advantage taken of the infancy at law, and the penalty recovered against the heir, he may resort again to equity to have the whole thing reconsidered, which is now as proper for the judgment of the court as it would be then. Wherefore decreed as above.

11. Testatrix entered into a bond for payment of a considerable sum to defendant at her death, in nature of a legatory disposition of so much secured by bond. Defendant obtained judgment at law on the bond against plaintiff, her executor, who filed the present bill, to have the bond and judgment set aside on a suggestion of fraud and want of consideration. Lord Chancellor thought the bond a good one, and that the only question was, on what terms plaintiff could be relieved against the judgment for the penalty. Plaintiff in this case had pleaded *non est factum*, and had judgment against him *de bonis testatoris, sed non de bonis propriis*. The present bond being voluntary, it was admitted it should be postponed to simple contracts; and that if claimed for money lent, and the party fails in proving such consideration, he cannot afterwards set it up as a voluntary bond (a). The question however came on again, whether a plea of *non est factum*

11 Dec. 1735, cor. Talbot, C.

Cray v Rooke,

Ca. temp. Talb. 153.

2 Eq. Abr. 182. pl. 7.

Vide Jones v. Powell,

1 Eq. Abr. 84. pl. 2.

Fairbeard v. Bowers, 2 Vern. 202.

Proc. in Ch. 17.

Ramsden v. Jackson, 1 Atk. 294.

* These words are not in the original.

Note; Although the bond in the principal case was voluntary and postponed in point of payment to simple contracts, yet it must not be in a worse condition than they are; its being voluntary gives the heir no right to set it aside. For as the ancestor might have granted the estate entirely away from the heir; so, when he thinks proper to charge himself and his heirs, the heir shall be bound in respect of the assets descended upon him from his ancestor.—Leaving the obligee to sue the bond at law where she can recover but the penalty, and

where the parol must demur till the heir (now three years old) comes of age, would be delaying her much too long. And since even after advantage taken of the infancy at law, and the penalty recovered against the heir, he may resort again to equity to have the whole thing reconsidered, which is now as proper for the judgment of the court as it would be then. Wherefore decreed as above.

1 Feb. 1737, cor. Hardw. C.

Ramsden v. Jackson, 1 Atk. 292.

(a) *Vide Fairbeard v. Bowers*, *Proc. in Ch. 17.* as to the cases there referred to.

(a) *Rock v. Leighton*, Salk. 310.

factum was an admission of assets? Lord Chancellor held it was (a), and the same as a case of judgment by default against an executor. If an executor pleads *non est factum* to a bond, and not *plene administravit* likewise, he cannot after verdict take advantage of what might have been pleaded to the action. Decreed the executor should be relieved against the penalty of the bond on payment of principal and interest, without any regard to the question, whether the executor had sufficient assets.

17 Nov. 1740, cor. Hardw. C.
Lloyd v. Carter, 2 Atk. 84.

12. A. gave a woman who cohabited with him a bond for 2000 *l.* and interest quarterly during her life, and after her death to her children; but from the date of the bond to the day of his death which was four years and a half, he constantly maintained her. Lord *Hardwicke* held the maintenance must clearly be taken to have been in lieu of interest.

4 May 1747, cor. Hardw. C.
Blount v. Dougby, 3 Atk. 484.

13. Where a father makes a will, and in considering the particulars of his estate gives a legacy to his son, desiring he will do an act for his sister's benefit, this amounts to an obligation upon the son as far as the value of the father's estate extends.

Vide Thynn v. Thynn,
1 Vern. 296.

Where a son taking beneficially by a father's will, promises to make it good, this may be a valuable consideration for a bond, and would not be fraudulent.

So a promise under age may be a consideration for a promise when of age, and it has been so held at common law.

In the present case, the father having provided largely for his son, requested him to give his sisters 1000 *l.* each on their marriage, and the son gave his sisters two several bonds accordingly. The son then died indebted, and thereupon a question arose whether such bonds were voluntary, and should be postponed to other debts? Lord *Hardwicke* said, it would be extremely dangerous for the court to determine such bonds voluntary, if they are not adequate or tally exactly with the sum given for them; the court has not measured the consideration of debts of this kind by exact rules of proportion of value, nor does it require that the consideration should be commensurate to the value of the estate; but if such a contract was fairly entered into without any circumstance of fraud, then it has been held as made for a valuable consideration.

Vide 1 *Newstead v. Searle*,
1 Atk. 265.
Stiles v. Attorney-General,
2 Atk. 152.

Whenever

Whenever the court shall see a consideration is made up with a view to defraud creditors, the court will lean against it, and reduce it to what is just and equitable; but in the present case there is no such ingredient or imputation; wherefore decreed the sisters should be admitted as bond creditors for a valuable consideration to the full extent.

14. A young woman of good character went to live with *A.* as companion to his sister, at the same time knowing him to be a married man: she is seduced by him, and causes a separation between him and his wife, and has a grant or bond from him. Her bill for payment was dismissed.

15. The court would not relieve against a voluntary bond given to a common prostitute by a person after he had kept her several years, upon a bill by the executor of the obligor.

As to the order and priority which shall be observed with respect to voluntary bonds in case of the death of the obligor, see more under *Executors and Administrators*.

As to the doctrine of tacking a bond-debt to a mortgage where the same is due to a mortgagee or other incumbrancer, see *Mortgage, Securities and Incumbrances*.

As to bonds given by men to their mistresses *pro turpi causa, aut in premium pudicitiae*, see *Seduction*.

Sec. 5. Of Bonds defective or void at Law, where aided or made good in Equity.

1. A Bond was given by *A.* to his intended wife before marriage, to leave her 1000 *l.* if she survived him. The marriage was afterwards had, and *A.* mortgaged his estate, and died. Bill by the wife to have the benefit of the bond, though extinguished at law by the intermarriage, and that she might be admitted as a bond-creditor to redeem the mortgage, and hold over till she was fully satisfied. *Per cur.*—The bond if set up (*a*), must be set up entirely, and not in part only, to bind the personal assets, and not the real. Decreed, the plaintiff should redeem the whole, and hold over, though

A feme covert joins in an alienation of her jointure, and had another made the same day without precedent articles or agreement; held not fraudulent against purchasers. *Bell v. Scott*, 2 Lev. 70.

8 Feb. 1751, cor. Hardw. C.
Priest v. Perrott, 2 Ves. 160.
Vide Anandale v. Harris, 2 P. Wms. 423. 1 Eq. Abr. 87.

28 Feb. 1767, cor. Camden, C.
Hill v. Spencer, Amb. 612.
Vide Robinson v. Cox, 30 July 1741. *Priest v. Perrott*, 2 Ves. 160.

H. 1704, cor. Wright, C. S.
Atton, Widow, v. Pierce & al.
2 Vern. 480.
1 Eq. Abr. 63. pl. 5.
Proc. in Ch. 237. S. G. nomine Atton v. Atton.
Vide Cotton v. Cotton, 2 Vern. 290. *Proc. in Ch. 41. Cannel v. Buckle*, Com. Rep. 67. Salk. 325.

(*a*) In *Proc. in Ch. 238*. it is said the court would not support this as a bond, but as a marriage agreement.

though copyhold estates as well as freehold were comprised in the mortgage.

H. 1710, cor. Harcourt, C.
Crosby v. Middleton & others,

Proc. in Ch. 309.

2 *Eq. Abr.* 188. c. 1.

3 *Ch. Rep.* 99.

Lord Keeper said the defendant's hand and seal was sufficient for equity to relieve upon, and held the parties to their original agreement.

13 May 1720, Dom. Proc.
Butler Esq. v. Prendergast Bart.

& al. 2 *Bro. P. C.* 170.

13 *Vin.* 546. pl. 13.

16 *Vin.* 248. pl. 5.

2 *Eq. Abr.* 481. pl. 16.

4 Dec. 1721, Dom. Proc.

Tale, Widow, v. Rex,

2 *Bro. P. C.* 381.

Bunb. 58. 5 *Vin. Abr.* 99. c. 9.

16 *Vin. Abr.* 531. c. 8.

19 *Vin. Abr.* 39. c. 2. 516. c. 58.

T. 1725, cor. King, C.

Duke of Chandos v. Talbot,

Sel. Cas. in Ch. 24.

2 *Eq. Abr.* 449. pl. 4.

1 Feb. 1730, cor. Hardw. C.

Simpson v. Vaughan,

2 *Ak.* 31.

2. *A.* agrees to be bound in a bond as security to *B.*, and signs and seals it accordingly, but by the neglect of the clerk *A.*'s name was not inserted in the bond. The obligee shewing *A.* the condition, and his name and seal, demanded payment, and threatened to sue him unless he would give fresh security, which *A.* agreed to, but after finding the mistake he refused, not being bound by law, yet equity compelled him.

3. *A.* agreed with *B.* for the purchase of timber, and together with *C.* entered into a bond that *A.*, his executors and administrators, should not cut any timber under a particular size, but *A.*'s name was only made use of in this agreement for *C.* *C.* cuts down timber under the size stipulated, but as there could be no remedy against *C.* upon the bond, it was held to be a fraud upon *B.* the feller, and therefore relievable in equity.

4. Where the condition of a bond is entire, and the whole unlawful, it is in most cases void; but where it consists of different parts, some of which are lawful and others not, it is good for so much as is lawful, and void for the rest.

5. A bond was put in suit against an executor, who pleaded *plene administravit*, that he was a bond-creditor himself, and had paid himself. On the trial it appeared there was an interlineation of 50 *l.* after the bond was executed, so at law the bond was entirely void. Now application was made, that though the bond be void at law, yet it may be considered as good in equity for what it was really given. And Lord Chancellor King said, that this, at most, can be but a charge by simple contract, for you yourselves have destroyed its being a bond; so it is as if it never had been, and so can be no bar to the payment of a debt of a superior nature.

6. A tradesman ignorant of the nature of a bond, fills up one from *A.* and *B.* to *C.*, in which the obligors are only jointly bound; one of them being dead, it was insisted the survivor was answerable for the whole money; and the court relieved the plaintiff upon the mistake, it being the manifest intention of the parties that the obligors should be jointly and severally bound.

7. Though

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7. Though a husband has imposed on a wife, by giving her a bond void at law, yet equity will establish the agreement according to the intention of the parties.

10 Dec. 1740, cor. Hardw. C.
Watkins v. Watkins, 2 Atk. 97.

8. A bond given to *A.* payable at a future time, without naming his executors; if *A.* dies before that time, the executors will be entitled to sue upon the bond,

H. 1742, cor. Hardw. C.
Emes, Administrators, v. Hancock,
2 Atk. 509.

9. A bond having been given for a certain sum, which was calculated to be the amount of a residue of a personal estate, and it turned out the same was miscalculated. Bill to have the bond considered as a security only for the real sum dismissed, for there was no evidence of such a mistake.

H. 1792, cor. Thurlow, C.
Burt v. Barlow,
3 Bro. Cb. Ca. 451.

10. A bond given in consideration of future cohabitation is void at law.

17 May 1797, cor. Loughb. C.
Franco v. Bolton, 3 Ves. jun. 371.

See more *post*, sect. 9. sect. 11.

Sec. 6. In what Cases the Condition or Recital of a Bond shall be considered as an Agreement or as Evidence of an Agreement between the Parties, and take Effect as such.

1. THE condition of a bond was to settle certain lands in such a manor, by such a day. The obligor died before the day, and so saved the bond at law. Decreed the lands to be settled.

P. 1697, cor. Somers, C.
Holtbam v. Ryland,
Nels. Cb. Ca. 205.
1 Eq. Abr. 18. pl. 8.

2. If one is bound by bond to transfer 300 *l.* East-India stock before September the 30th then next, though the stock is much risen, yet the defendant shall be decreed to transfer the 300 *l.* stock in specie, and to account for all dividends from the time that it ought to have been transferred.

M. 1700, Canc.
Gardner v. Pullen, 2 Vern. 394.
1 Eq. Abr. 91. pl. 4.

3. A man before marriage gave bond to the woman to leave her 1000 *l.* if she survived him. The marriage took effect, and then the husband died intestate, all his estate both freehold and copyhold being in mortgage. The widow took out administration, and brought her bill against the heir and mortgagee to be let into a redemption of the whole. Decreed accordingly, though the bond was released and gone at law by the intermarriage, and

H. 1704, cor. Wright, C. S.
Aston v. Aston, Prec. in Ch. 237.
1 Eq. Abr. 63. pl. 5.
2 Vern. 480. S. C. nomine *Aston v. Pierce*.
Vide Cotton v. Cotton, 2 Vern. 290. Prec. in Ch. 41. Cannel v. Buckle, Com. Rep. 67. Saik. 325. Croby v. Middleton, Prec. in Ch. 309. *Watkins v. Watkins*, 2 Atk. 97.

and though the copyhold was not affected by the bond, it being in nature of a marriage agreement.

M. 1724, cor. Macclesfield, C.

Cannel v. Buckle,

2 P. Wms. 243.

2 Eq. Abr. 23. pl. 24. 136. pl. 1.

(a) *Vide Gage v. Acton, Com.*

67. Salk. 325. Bond to pay money after a marriage between the obligor and obligee. The debt is only suspended by the intermarriage, *Acton v. Pierce*, 2 Vern. 480. Bond by the husband to the wife before marriage to leave her 1000 l. though extinguished at law by the marriage, yet good in equity and shall bind the real assets; and decreed the wife after her husband's death to redeem a mortgage and to hold over, though copyholds as well as freeholds are included in the security.

Note; Lord Macclesfield thought it unreasonable that the intermarriage, upon which the bond alone is to take effect, should itself be a destruction of the bond. The foundation of this notion is, that in law the husband and wife being one person, he cannot (at law) sue his wife on this agreement. Yet in equity it is constant experience, that the husband may sue the wife and the wife the husband, and he might sue her in this case upon this very agreement. Neither is it a rule, that where an action cannot be brought at law upon an agreement for damages, a suit in equity will not lie for a specific performance. Suppose a feme infant seized in fee (1), on a marriage with the consent of her guardians, should covenant in consideration of a settlement to convey her inheritance to her husband, if this were done in consideration of a competent settlement, equity would execute the agreement, though no action at law would lie to recover damages.

(1) As to the case of the feme infant. *Vide Lucy v. Moore*, 3 Bro. P. C. 514. *Price v. Seys*, Barn. 122. *Seamer v. Bingham*, 3 Atk. 56. *Harvey v. Ashley*, 3 Atk. 607. * *Earl of Bucks v. Drury*, 5 Bro. P. C. 570. † *Durnford v. Lane*, 1 Bro. Ch. Rep. 106. ‡ *Williams v. Williams*, 1 Bro. Ch. Ca. 152. *Sloman v. Glubb*, 2 Bro. Ch. Ca. 545.

* Lord Hardwicke said, it was going a great way to decree an execution of the agreement in such case, as it related to the wife's inheritance, yet there are cases in which the court will do it, as if the hands of the wife were no more than an adequate consideration for the settlement the husband makes, and after the marriage the wife should die and leave issue, who should be entitled to portions provided for them by the settlement, it would in that case be very reasonable to affirm that settlement.

† In *Durnford and Lane*, Lord Thurlow said, *Drury and Drury* was a question at law, which *Cannel v. Buckle* was not. If Lord Hardwicke's opinion in *Harvey v. Ashley* be right, he has determined the point in *Cannel v. Buckle*.

‡ *Ibid.*

M. 1724, Cane.

Atison's case, 9 Mod. 62.

2 Eq. Abr. 739. pl. 7. (a).

Vide 1 Ch. Ca. 39. 171. 3 Ch.

Rep. 4. 2 P. Wms. 630. 2 Com.

Dig. "Chancery (4. 1). *Vide*

Herbert v. Lowndes, 1 Ch. Rep.

13. *Devenish v. Baines*, Prec.

in Ch. 3. *Barnley v. Powell*, 1 Ves. 287.

Seilach v. Harris, 5 Vin. Abr. 521. pl. 31.

Maxwell v. Montacute, Prec. in Ch. 526. and Fontbl. Eq. 2 vol. 38.

(a) Note; In 2 Eq. Abr. 22. pl. 21. this is stated to be the same case as *Parks v. Wilson*,

10 Mod. 115. which see *ante*, tit. Agreement, f. 3. pl. 40. and notes.

Bonds have been considered in equity as evidences of agreements, and the obligors have been held to a specific performance of them. *Vide* Lord Raym. 683. *Norton v. Mafcall*, 2 Vern. 24. *Duke of Chandos v. Talbot*, 2 P. Wms. 608.

M. 1728, cor. M. R.

Acton. Mos. 37.

4. Feme gives a bond to her intended husband, that in case of her marriage she will convey her lands to him in fee; they intermarry; the wife dies without issue, and then the husband dies. The bond, though void in law (a), is good evidence of the agreement in equity, and the heir of the husband shall compel a specific performance against the heir of the wife.

that in case of her marriage she will convey her lands to him in fee; they intermarry; the wife dies without issue, and then the husband dies. The bond, though void in law (a), is good evidence of the agreement in equity, and the heir of the husband shall compel a specific performance against the heir of the wife.

5. A mother gave a bond to her son conditioned to surrender a copyhold estate to him, to which he was heir. Decreed that she was a trustee for her son, and therefore that she should surrender to the use of her son, and both of them be admitted as coparceners.

6. A bond conditioned to convey lands for money received, is considered in equity as articles, and the condition shall be performed in specie. The obligee having been in possession twenty years need not prove the money paid.

7. A bond

7. A bond given by a husband reciting an agreement to settle his wife's estate: the wife was not an executing party; but by her acts after her husband's death she bound herself to a performance, and the same was decreed accordingly.

So may the widow of a freeman of London bind herself by her acts after her husband's death, though his will be contrary to the custom.

8. J. S., previous to his marriage, gave a bond enabling his intended wife to dispose of her freehold estate by deed or will, notwithstanding her coverture: it did not appear that any settlement had been made, or any transaction, but the bond. *Per Lord Chancellor*—Though this case differs from *Wright v. Cadogan* *, in respect that there the wife had only an equitable interest, whereas here she had a legal one; yet the principle of the determination is the same in both. Performance of the agreement therefore shall be decreed here as it was there.

See more *ante*, tit. *Agreement*, *post*, tit. *Evidence*, *at post*, tit. *Marriage*.

Sec. 7. Of Bonds payable on a Contingency: And herein of uncertain and ambiguous Conditions.

1. *A.* Gives a bond to pay 900*l.* to his daughter in case he should have no son living at his decease. *A.* died, his wife being enfeint of a son. Decreed the daughter should not have this 900*l.*

yet it could not be presumed to be *A.*'s intention, that if a son was born after his decease, the daughter should run away with the estate; in this case it appeared that the mother was quick at *A.*'s death; and by the civil law, *posthumus pro nato habetur*.

2. *A.* on his marriage gives bond to leave his wife 500*l.*, or a third of his personal estate at her election, the wife having had on her marriage a portion of 500*l.*, secured by land. *A.* becomes bankrupt. Bill by the assignees to have this 500*l.* raised by a sale, and decreed accordingly (*a*); but that the wife should come in as a creditor on her bond, and what shall be paid in respect thereof to be put out at interest, and the interest to be paid to

19 July 1754, cor. Hardw. C.
Archer v. Pope, 2 Ves. 523.

M. 1769, cor. Camden, C.
Rippon v. Dawding,
Ambl. 565.
1 *Eq. Abr.* 61.

* 6 Bro. P. C. 156.

M. 1698, Canc.
Gibson v. Gibson,
2 *Eq. Abr.* 184. pl. 3.
2 *Freem.* 223.

Although there was no son living at *A.*'s decease, and the bond was not recoverable at law, yet it could not be presumed to be *A.*'s intention, that if a son was born after his decease, the daughter should run away with the estate; in this case it appeared that the mother was quick at *A.*'s death; and by the civil law, *posthumus pro nato habetur*.

T. 1710, Canc.
Holland v. Calliford, 2 *Vern.* 662.

It should seem that the trusts of the settlement on this marriage were as to the rents and profits of the wife's estate (*inter alia*) to the husband for life, or that he was tenant by the courtesy, else why should he be entitled to the interest of the 500*l.* for his life; and the creditors can only stand in the bankrupt's place.

(*a*) The assignees in this case filed their bill to have the wife's

portion raised and paid by a sale of the land charged. This surely is contrary to the principle of those cases which bind the husband and those claiming under him, to provide for the wife where they sue for her fortune in equity; for here she seems to be wholly unprovided for during the husband's life.

(b) Lord Macclesfield is said to have doubted of this. *Vide ex parte Bayley*, Hil. 1720. 3; but the point coming in question before Lord King, *Ex parte Caswell*, 2 P. Wms. 497. his lordship ordered the precedents in Lord Cowper's time to be left with him. The case *Ex parte Caswell* was that of a husband's bond to a trustee to secure 1000*l.* to his wife, if she survived him. The husband became bankrupt: this debt was not allowed nor any reservation made for it (1); neither shall it stop the distribution, in regard it may never be a debt; but if the contingency happens before a final dividend (2), then such a debt shall be admitted.

(1) *Vide Tully v. Sparks*, Lord Raym. 1546. *Ex parte Jeffries*, 4 Vin. Abr. 72. pl. 7. *Ex parte King*, Dav. 254. *Hancock v. Entwistle*, 3 Term Rep. 435. *Scds* where the provision is secured by a judgment or bond forfeited at law before the bankruptcy. *Ex parte Groom*, 1 Atk. 115. *Ex parte Winchell*, 1 Atk. 116. *Ex parte Mitchell*, 1 Atk. 120. *Ex parte Greenaway*, 1 Atk. 113. *Goddard v. Vanderheyden*, 3 Will. 271. Where the contingency upon which the money is payable is the bankruptcy or insolvency of the debtor, such debt cannot be proved under his commission. *Ex parte Hill*, Cooke's B. L. 282.

(2) *Sed contra Ex parte Groome*, 1 Atk. 118.

* A judgment at law with a defeasance is not a contingent debt. 1 Atk. 117.

M. 1726, cor. King, C.
Ex parte East India Company,
2 P. Wms. 396.

2 Eq. Abr. 105. pl. 4. (n).

(a) *Sed vide* 5 Geo. 2. c. 30. s. 21. as to the proof of debts on securities payable at a future day.

(b) But if the contingency happens before the bankrupt's estate be fully distributed, such creditor shall come in *pro rata*. *Vide Ex parte Caswell*, 2 P. Wms. 497. and Mr. Coxe's notes thereon.

M. 1728, cor. King, C.

Ex parte Caswell,

Coxe v. Bateman,

2 P. Wms. 497. 499.

Mof 28. 79. S. C. nomine
Gazet ex parte.

Vide Holland v. Calliford,
2 Vern. 662. *Ex parte Bayly*
cor. Macclesfield in H. 1720.

(a) *Tully v. Sparks*, Raym. 1546. *Ex parte Jeffries*, 7 Vin. Abr. 72. pl. 7. *Ex parte King*, Dav. 254. *Hancock v. Entwistle*, 3 Term Rep. 435. *Scds* where the provision is secured by a judgment or bond forfeited at law before the bankruptcy. *Vide Ex parte Groome*, 1 Atk. 115. *Ex parte Winchell*, 1 Atk. 116. *Ex parte Mitchell*, 1 Atk. 120. *Ex parte Greenaway*, 1 Atk. 113. *Goddard v. Vanderheyden*, 3 Will. 271. *Hancock v. Entwistle*, 3 Term Rep. 435. where the contingency upon which the money is payable is the bankruptcy or insolvency of the debtor, such debt cannot be proved under his commission. *Ex parte Hill*, Cooke's B. L. 282.

(b) The case of an obligee in a bottomry or respondentia bond is now provided for. 19 G. 2. c. 32. s. 2. *Vide post*, tit. Trade.

(c) *Sed vide Ex parte Groome*, 1 Atk. 118. *contra*.

It was objected in this case that such a bond would be barred by the bankrupt's certificate, which Lord King said could not be if the obligee is careful in declaring upon his bond. Indeed, if the party declares upon the bond only he shall be barred. *Scds* if he sets forth as well the condition as the bond in the declaration, for then it must appear that the cause of action did not accrue at the time of the obligor's becoming a bankrupt. In *Ex parte Groome*, 1 Atk. 118. Lord Hardwicke said, that Lord King's opinion in this case was *obiter* only. Lord Talbot doubted of it, and Lord Hardwicke differed from him entirely. *Sed vide* Attop and Price, 1 Dougl. 160. 3d edit.

3. If a bond or note be given by a trader upon a contingency, and before it happens the trader becomes a bankrupt, and then the contingency happens, this is not within the stat. of 7 Geo. 1. c. 31. (a); neither shall the debt arising (b) after the bankruptcy be satisfied under the commission.

4. A trader on marriage gives a bond to a trustee to secure 1000*l.* to the wife if she survive him. The trader becomes a bankrupt. This debt shall not be allowed nor any reservation made for it; nor shall it stop the distribution, in regard it may never be a debt (a). So within the same reason an obligee in a bottomry-bond (b) shall not, before the return of the ship, come in under a commission of bankruptcy; but in either of these cases, if the contingency happens before the bankrupt's estate be fully distributed, such creditor shall come in for his proportion (c).

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5. Petitioner's husband, before marriage, gave her father a bond in the penalty of 600*l.* conditioned for the payment of 300*l.* to her in case she survived him. He has a commission of bankruptcy taken out against him, and dies in 10 days after. The court thinking it a doubtful case whether she should or should not be admitted a creditor, *did not give an absolute opinion*; but on the assignees consenting she should come under the commission for 150*l.*, ordered her a dividend accordingly.

23 Dec. 1740, cor. Hardw. C.
Ex parte Greenaway,
1 Atk. 113.
Vide Ex parte Caswell & al.
2 P. Wms. 497.

6. J. G., previous to the marriage of the petitioner and his daughter, by bond became bound to the petitioner in 2000*l.*, conditioned as follows:

20 Oct. 1744, cor. Hardw. C.
Ex parte Winchester,
9 Mod. 471.

"That if the marriage took effect, and if the heirs, &c. of J. G. should, at the expiration of 12 months after the death of the survivor of the said J. G. and B. his wife, pay unto the petitioner, his executors, &c. 1000*l.*; and also if the said J. G., his heirs, &c. should; until the 1000*l.* became due and was paid, pay unto the petitioner, his executors, &c. interest for the same; at the rate of 4*l.* per cent., half yearly, on *Christmas* and *Midsummer* days in every year; the first payment to be, &c.; that then, &c." By articles bearing even date with the bond this money was to be laid out at interest, and the interest to be paid to the husband for life, then to the wife, and then the principal to be divided amongst his children as therein mentioned. - J. G., the father, paid all the interest up to *Christmas* last; none of the payments were made precisely on the day they became due, but some days after. Before *Midsummer*, no interest being due on the bond, the father became a bankrupt; and now the petitioner prayed to be admitted a creditor under the commission for the 1000*l.* so secured. It was argued for the assignees, that no action could be brought on this bond at the time of the bankruptcy, and therefore it was no debt; and that the interest accrued at *Midsummer* since the bankruptcy could not entitle the petitioner to be let in; and that though an action lay at common law upon non-payment of the money at the day in the condition, even though it was paid at a day after; yet now by the 4 & 5 Ann. c. 16. s. 12. money paid after the day might be pleaded in bar as well as at the day, provided it was paid before the action was brought, so that this case was within the act; and consequently, as no action could be brought, no

Vide Ex parte Groome, 1 Atk. 115. determined differently by Lord Hardwicke on some day under other considerations. Groome's case being that of a contract and not of a bond, which see ante, tit. Bankrupt et etiam tit. Baron and Feme.

In *Tully v. Sparks*, 2 Raym. 1546. there were two contingencies, and as both had not happened at the time of the act of bankruptcy, it being uncertain whether the bond would ever become due or not, it was impossible to make such abatement of 5 per cent. as the act directs, and therefore *cur. B. R.* were of opinion the bond was not within statute 7 Geo. 1.

debt was due. But Lord *Hardwicke* considering the act as applicable only to bonds payable at a certain day and place, and this a bond payable, as to the interest, at several days; and as to the principal, at a day future and uncertain; and therefore not within the words or intent of the act; and that the penalty might have been recovered at law before the bankruptcy; ordered the petitioner to be admitted a creditor for principal and interest, and the dividend he should receive to be laid out according to the articles; and said, this court will relieve the assignees only upon equity being done according to the condition.

26 Oct. 1748, cor. Hardw. C.
Hill v. Caillouel,
1 Ves. 122, 123.

7. *A.* in 1720 gave a bond for payment of 520*l.* in 6 months after his father's death, if he survived, otherwise to be void: the father was then 70, and in 1731 he died. *A.* died in 1734, when an action was brought against his executrix upon the bond. The court would not grant relief except against the penalty, there being no proof of imposition, although suspicious circumstances in it.

23 Dec. 1751, cor. Hardw. C.
Ex parte Eliz. Mitchell,
1 Atk. 120.

Vide Ex parte Caswell, 2 P. Wms. 497. *Ex parte Greenaway*, 1 Atk. 113.

Lord *Hardwicke* said, that his opinion, *casu Ex parte Groome*, was founded on *Tully v. Sparks*, in B. R. (Raym. 1546.) and that the only difference between the principal case and *Ex parte Groome* was, that *Groome's* was on contract and this on bond.

8. *B. M.*, in pursuance of articles before marriage with the petitioner, executed a bond to *T. M.* and *W. R.*, trustees under the articles, in the penalty of 1000*l.*, conditioned to be void if the heirs, &c. of *B. M.* should pay to *T. M.* and *W. R.* 500*l.* within three months next after the death of *B. M.*, for the use of the petitioner; or in case she should not survive, to the use of her child or children, if any. A commission of bankruptcy issued against *B. M.*, who died on the 1st April 1749. On the 28th of the same month a dividend was made of 9*s.* in the pound: the petitioner prayed to be paid a proportionable dividend: the assignees being served with notice, and *no counsel attending for them*, the court directed she should be admitted a creditor, and receive a dividend of 9*s.* in the pound, *not being opposed*.

A judgment would have made it an immediate debt, and she would have been entitled to have come in as a claimant before her husband's death, and the assignees must then have retained sufficient on a dividend day to answer a proportionable dividend to the petitioner when the event happened.

Lord Chancellor *King's* being an *obiter* opinion as to a wife's being admitted to a dividend, and Lord *Talbot* doubting of it, and the present Chancellor in a case *Ex parte Groome*, December 1741., refusing to admit

22 Jan. 1752, S. C. 121.

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admit such a person creditor, his lordship would not suffer the secretary to draw up the order pronounced at a former day of petitions, though not defended; but recommended it to the assignees to compromise it with the petitioner.

See more *ante*, tit. *Bankrupt, Baron and Feme.*

Sec. 8. Of Bonds given or held in Trust: And herein of the Abuse of such Trusts.

1. A Man trusts his scrivener to put out his money, who took a bond for it, which he delivered to his client. The scrivener received the interest, and afterwards called in the principal. The obligor paid him the principal, and took his engagement to deliver up the bond. The scrivener wrote to his client for the bond, who sent it, taking the scrivener's engagement to deliver back the bond, or pay the money. The scrivener broke; and the obligee for a little money got the bond from his clerk, and put it into suit. Upon a bill by the obligor for relief, and to have the bond delivered up, decreed accordingly; for the scrivener was a trustee after the bond was delivered to him.

P. 1691, Canc.
Abbington v. Orme,
1 Eq. Abr. 145, pl. 3.

2. A bond was taken for 1400*l.* in the name of *L.* a scrivener, in trust for *J. S. L.*, having occasion for money, without the privity of *J. S.* borrowed it of *B.*, and assigned this bond as a security. *B.* had no notice of the trust; and nothing of the trust appeared by the bond. In Sir *Ed. Abney's* case it was held, that a mortgage assigned under the same circumstances would have been good, because there the legal estate vested in the assignee without notice; but as to a bond, nothing passes by the assignment but an equitable right which is rebutted by the prior equity in *J. S.* The Master of the Rolls deferred his opinion till he had seen Sir *Ed. Abney's* case.

P. 1697, cor. M. R.
Penn v. Brown & al.
2 Freem. 214.
2 Eq. Abr. 708. c. 2.

3. *A.* and *B.* being trustees of money for the separate use of a feme covert, lend it to *C.*, who gave a bond to the trustees, and the trust is declared in the condition. The bond is kept by the feme; and *B.*, one of the trustees, having received money for *C.*, settled an account with him, and gave him a receipt for 100*l.* as on account of the feme. *B.*

H. 1705, cor. Cowper, C. S.
Baldwin v. Billingstey,
2 Vern. 539.

P p 2 became

(a) Payment to the obligee after notice of an assignment of the bond is not good.

became insolvent. *Per Lord Keeper*—This is a case of unusual circumstances, there being a power for the trustee to receive and pay, to call in, and put out money; but the trust being particularly declared in the condition of the bond, C. ought to have been cautious how he paid the money, it being in equity the money of the feme as much as if the bond had been assigned to her (a). B. might certainly have received the money if he had had the bond; but having delivered that over to the feme, B. had divested himself of the trust, and had put it altogether in the feme's power to receive, and therefore the payment to B. was not a good payment; besides, it is plain C. was conscious the payment would not be allowed, for he never mentioned till four years after when B. failed.

M. 1705, cor. M. R.
Sir John Wolfenbalm v. Davies,
2 Freem. 289.

2 Eq. Abr. 709. pl. 5.

It appears it would have been otherwise if the scrivener had been entrusted with the bond.

4. J. S. having borrowed 100*l.* of A. upon bond, which was procured by B. a scrivener when the bond was sealed, it was delivered to the obligee. J. S. paid several years interest to B., and 50*l.* part of the principal, which B. paid to the obligee, but the last 50*l.* being paid to B., he broke before he paid it over. *Per Master of the Rolls*.—Although B. received the interest so long, and part of the principal, it did not imply he had any authority. As J. S. did not prove that B. had any authority, decreed he should pay the last 50*l.* again.

M. 1724, cor. Jekyll, M. R.
Sir Charles Cox's Creditors,

3 P. Wms. 342.

2 Eq. Abr. 262. pl. 19. (n.)

(a) *Vide Willon v. Fielding*,
2 Vern. 673.

5. A bond is given to B. in trust for A., who dies; the money due on the bond shall be paid in a course of administration (a), for in such case there can hardly be any dispute touching the quantum of the debt, seeing the principal, interest, and costs must be paid to the obligee in the bond.

M. 1738, cor. Hardw. C.
Bower v. Savadin,

1 Atk. 294.

Vide Ex parte Smith, 1 P. Wms. 237. 2 Eq. Abr. 104. pl. 1. where an obligee sued a co-obligor, and after taking him in execution on a *ca. sa.* received 24*l.* and discharged him; the obligee, however, was afterwards admitted a creditor for half the debt under a commission against the other obligor; and it seems he would have been admitted a creditor for the whole, but that the co-obligor who was sued was only 2.

6. A release to one obligor is a release to both in equity as well as at law, but if there be an assignment of the bond in trust for the benefit of others precedent to the release, though without consideration, it will be a material question whether the obligee could release, or if it could operate to the release, as he must be presumed to have notice of this assignment, being himself a trustee in the assignment, and every man is supposed to be conusant of a deed to which he is a party. Lord Chancellor directed this cause to stand over till it should be made appear whether the date of the release

release was precedent or subsequent to the assignment.

surety. *Vide Ex parte Ryfwicke*, 2 P. Wms. 89.

7. A bond given to *A.* in trust to secure the payment of an annuity of 40*l.* during the joint lives of Sir *Edward Smith* and petitioner the bankrupt's wife, who in 1751 married the bankrupt: he delivers up the bond upon his last examination: she applies to the court, and prays the assignee may deliver the bond to her trustee; and that the arrears of the annuity and all future payments may be made to her. Ordered accordingly.

Where a bond is given to a trustee for the benefit of a wife, and the husband becomes a bankrupt, the assignees cannot bring an action; for by 1 *Jac. I. c. 15. s. 13.* assignees can only have the like remedy to recover a debt as the bankrupt himself might have had, the word *party* in the act being meant of the bankrupt.

8. A devisee for life of a rent-charge out of an estate devised in strict settlement, assigned it to creditors as a collateral security. The tenant for life, with intent to redeem it for the annuitant, gave bonds to the creditors on condition of giving up their securities to be cancelled. The executors of the obligor paid all the bonds but one, which they disputed, because though delivered by the obligor to a third person for a creditor, when he should agree it was not accepted till after the death of the obligor. This bond was recovered upon at law. The annuitant is entitled as against the executors to the annuity disincumbered, but not to the arrears incurred in the life of the obligor, and as against the tenant of the estate to the arrears since the death of the obligor, but the future payments must be left to agreement, as the heir at law of the devisor of the annuity not being a party, execution of the trusts of the will could not be decreed.

A bond delivered to a third person to be delivered to the obligee on performance of a condition, takes effect on performance from the original sealing and delivery, and is good to charge assets, though the obligor and obligee be both dead (*a*).

Bond by feme delivered to a stranger before her marriage (*b*), as an escrow to be delivered on condition, is good, though the condition be performed after marriage.

22 Jan. 1753, cor. Hardw. C.

Ex parte Coysegame,

1 *Atk.* 192, 3.

Note; It appears that the bankrupt's wife brought him a portion of 500*l.* and had nothing to subsist upon but this annuity.

The *obiter* opinion of Parker, C. J. in *Miles v. Williams*, 1 P. Wms. 255. "that *cessary* " *que trust* being a bankrupt, his assignees may bring an action on a trust bond in their own names, though he must have brought it in the name of his trustee, is denied by Lord Chancellor to be law.

10 Feb. 1791, Scacc.

Graham v. Graham,

1 *Ves. jun.* 271.

(*a*) *Vide Peryman's case*, 5 Rep. 84. where this was taken as clear law.

(*b*) *Froset v. Walshe, Bridg. 51.* *Brag's case.* *Butler's case.*

Payment made in the name of *A.* with his money raises a trust, but it is an equity which may be rebutted by evidence.

See more *post*, tit. *Trust and Trustee*.

Sec. 9. Of joint and several Obligations, and Bonds of Surety and Indemnity.

M. 1683, cor. North, C. S.
Lord Ranelagh v. Hayes,
1 Vern. 190.

1 Eq. Abr. 79. pl. 5.
Vide Nilbet v. Smith, 2 Bro.
Ch. Ca. 579. where an obligee
giving further time to an obligor
(the principal debtor) contrary to
the consent of a co-obligor, (his surety,) and thereby holding him longer bound than the time stipulated for payment of the money, was held to discharge the surety from the bond.

P. 1689, cor. Lds. Comrs.
Towers v. Moor, 2 Vern. 99.
1 Eq. Abr. 92. pl. 1.

M. 1692, Canc.
Mauve v. Harrison,
1 Eq. Abr. 93. pl. 3.

P. 1693, Canc.
Cotton v. Cotton, 2 Vern. 290.
Prec. in Ch. 41.

1 Eq. Abr. 63. pl. 4.
Note: The court compared this to a case where a man joins with a woman he is about to marry in assigning her personal estate in trust for herself, in which case he shall not have the benefit of it; or if it should be so taken, yet because the husband lived with his wife two years, and was party to the bond, and did not procure it to be delivered up and discharged, and being now dead, leaving his wife wholly unprovided for, the court would not hinder her of the means of providing for herself. Prec. in Ch. 41.

1700 Canc.
Sherfield and Lord Castleton,
1 Eq. Abr. 93. pl. 6.
2 Vern. 393. S. C. but not S. P.

M. 1701, cor. Wright, C. S.
Halford v. Byron,
Prec. in Ch. 173.
2 Eq. Abr. 188. pl. 1.

1. IF *A.* is bound for *B.* as his surety, and has a counter-bond from *B.*, and the money is become payable on the original bond, equity will compel *B.* to pay the debt, though *A.* is not sued; for it is unreasonable a man should always have such a cloud hang over him.

2. If two are bound jointly and one dies, the survivor only is liable in equity; but it is otherwise if they were bound jointly and severally.

3. A bond creditor shall have the benefit of all counter-bonds or collateral securities given by the principal to the surety; as if *A.* owes *B.* money, and he and *C.* are bound for it, and *A.* gives *C.* a mortgage or bond to indemnify him, *B.* shall have the benefit of it to recover his debt.

4. Plaintiff being executrix and residuary legatee of her former husband, lends 100*l.* to *A.* and *B.*, for which she took a note in her own name; and as a further security, she took also a bond from *A.* and *B.* in the name of a trustee; she afterwards married *B.*, one of the obligors. Held, this bond is not extinct.

or if it should be so taken, yet because the husband lived with his wife two years, and was party to the bond, and did not procure it to be delivered up and discharged, and being now dead, leaving his wife wholly unprovided for, the court would not hinder her of the means of providing for herself. Prec. in Ch. 41.

5. If *A.* be bound in a bond for payment of money, and *B.* be bound with him as his surety only, and the bond happens to be lost, equity will set up the bond as well against the surety as against the principal, because the bond was once a legal charge against both.

6. *A.* was bound to *B.* in 1000*l.* for payment of 500*l.* *A.* and *C.* as his surety afterwards gave a bond to *B.* of 200*l.* for payment of 100*l.*, as a further

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further security for so much of the 500*l.* Then *A.* assigned a judgment to *B.* of 500*l.* towards further satisfaction of the debt, and *B.* received several sums on this judgment. *A.* by consent of *B.* received 80*l.*, other part of the money secured on this judgment. This shall not go in exoneration of any part of the money secured by the 200*l.* bond, which it would have done if *B.* had actually received it, and lent it to *A.*

7. *J. S.* had an extravagant wife, who being in trade contracted a debt of 250*l.* with her semstrefs, part of which debt she requested the semstrefs would conceal from her husband. The semstrefs applied to the husband, and receiving that part of the debt which it was agreed she should discover, she gave the husband a receipt in full. Afterwards the wife prevailed on her husband's niece to join her in a bond to the semstrefs for the residue of the debt, which she did to the extent of 125*l.*, and then discovering the contrivance, she brought her bill to be relieved against the bond. Lord Chancellor thought the receipt from the semstrefs to the husband a sufficient discharge of the debt at law, and set aside the bond.

H. 1707, cor. Cowper, C.
Fowler v. Ayliffe,
2 *Eq. Abr.* 185. pl. 4.

8. If the principal in a bond, being arrested, gives bail, and judgment is had against the bail, and the securities are afterwards sued on the original bond, and are obliged to pay the money, the sureties shall have the judgment against the bail assigned to them, in order to reimburse them what they had paid, with interest and costs; and the sureties in the original bond are not to be contributory, for the bail stands in the place of the principal.

P. 1708, cor. Cowper, C.
Parsons v. Priddock,
2 *Vern.* 608.
1 *Eq. Abr.* 93. pl. 4.

9. *A.*, together with *B.* and *C.* as his sureties, executed a bond to *D.* for securing 300*l.* and interest; the debt is paid by *C.* with the proper money of *A.*, but *C.* neglects delivering up the bond to *A.* to be cancelled. *C.* afterwards procures this bond to be assigned, as a collateral security for a debt of his own. Held, that this assignment was a gross fraud in *C.*, and a perpetual injunction was granted to restrain all further proceeding upon the bond.

19 Jan. 1709, Dom. Proc.
May v. Harman, Esq.
1 *Bro. P. C.* 271.

10. A bond given as security for a collector of the customs does not extend to a subsequent duty upon coals, where the collector had a new deputation

M. 1709, in Scacc.
Bartlett v. Attorney-General & al.
Parler, 277.

M. 1709, Seacc.
Brudage v. Attorney-General,
Parker, 278.

T. 1713, cor. Harcourt, C.
Ex parte Smith, 1 P. Wms. 237.
2 Eq. Abr. 104. pl. 1.

* *Quere* why not the petitioner come in for the remainder of his whole debt, since each obligor was liable for the whole.

† *Vide Ex parte Ryswicke,*
2 P. Wms. 89.

12 Mar. 1720, Dom. Proc.
Butler v. Pendergrafs,
2 Bro. P. C. 170.
2 Eq. Abr. 185. pl. 6. 481. pl. 16.
13 Vin Abr. 546. pl. 13.
cites it as a MS. Rep. said to be
Lord Harcourt's.

M. 1725, cor. King, C.
Collins v. Griffiths,
2 P. Wms. 313.
2 Eq. Abr. 168. pl. 19. 198. pl. 2.
Vide Madox v. Jackson,
3 Atk. 406.

M. 1720, in Seacc.
Williams v. Jones and Attorney-General,
Bunb. 275.

Note; A difference was made where the party himself is before the court, and where the surety, as in *Moor, 126. pl. 274.*
2 Saund. 413. 1 Leon. 240. Hungate v. Hall.

T. 1730, cor. King, C.
Stanly v. Stuck, Mojt. 383.
Vide 2 Lev. 74. Hait v. Langham, 3 Lev. 300.

putation, and gave security for the duty upon coals.

So held in this case, where no security was given upon the second deputation.

11. *A.* lends money to *B.* and *C.* on bond. *A.* sues *C.*, and takes him in execution on a *ca. sa.*; whereupon *C.* pays *A.* 24 *l.* *A.* then consents to his discharge. *B.* became bankrupt. On the authority of *Bower v. Swadlin, 1 Atk. 294.* it was contended that the debt being *entire* in law, the whole debt was discharged. *Sed per cur.*—Let the obligee come in as a creditor under the commission against *B.* for a moiety of the remaining money due on the bond, for the execution against *C.* being subsequent to the assignment of *B.*'s estate, shall not discharge *A.*'s demand as to that estate; but in regard *B.* and *C.* were each in equity liable to *half* the debt only, and *C.* was not the original debtor for the whole, *A.* shall only have relief against *B.*'s estate for a moiety*. And Lord Chancellor said, that if *B.* had been the original debtor, and had borrowed *all* the money, *A.* should have come in as a creditor for *all* his debt†.

12. *A.* agreed for the purchase of timber; and *A.* and *B.* both entered into a bond that *A.*, his executors and administrators, should not cut down under such a size; it comes out that *A.*'s name was only made use of for *B.* in the agreement. *B.* cut down timber under size. There can be no remedy at law against *B.* upon this bond; but it is a fraud on the seller, and relievable in equity.

13. Two obligors in a bond bound jointly and severally, and one dies; the executors of the deceased obligor may be sued in equity for the debt without making the surviving obligor a party.

14. Security bond for a deputy postmaster for three years shall extend farther; but the court seemed to think, that if at the end of the three years the arrears had been paid up, plaintiff might have been then relieved.

15. If obligors are bound jointly and severally, the obligee may sue them in equity severally, as well as at law.

16. If *A.* and *B.* joint traders are bound in a bond jointly and severally to *J. S.*, he may elect to sue them jointly or severally; but if he sues them jointly, he cannot sue them severally (*a*), for the pendency of the one suit may be pleaded in abatement of the other. By the same reason, if *A.* and *B.* become bankrupts, and joint and separate commissions are taken out against them, *J. S.* may elect under which commission he will come, but he shall not come in under both; and he shall have a month's time to make his election.

8. *C.* But if two joint traders owe a partnership debt, and one of the partners gives a bond as a collateral security for payment of this debt, here the joint debt may be sued for by the partnership creditor, who may likewise sue the bond given by one of the traders.

17. A release to one obligor is a release to both in equity as well as in law.

Vide Ex parte Smith, 1 P. Wms. 237. Ex parte Ryfwicke, 2 P. Wms. 89.

18. A tradesman ignorant of the nature of a bond, fills up one from *A.* and *B.* to *C.*, in which the obligors are only jointly bound: one of them being dead, it was insisted the survivor was answerable for the whole money; and the court relieved the plaintiff upon the mistake, it being the manifest intention of the parties that the obligors should be jointly and severally bound.

19. Lord *Hardwicke* said, there was a case which he had determined in Chancery, where there were two persons jointly bound in a bond, and one of the obligors died. At law it certainly might have been put in suit against the survivor, but as his lordship thought it extremely hard, he decreed the representative of the co-obligor should be charged *pari passu* with the surviving obligor in payment of the bond.

20. A bond-creditor to whom partners were jointly and severally bound, may make his election to come against the joint or separate estate, but not against both, except for the deficiency, and after the other creditors are paid (*a*).

because the bond-creditors might have brought a separate action at law against each of them, and might have had likewise separate executions, but could not have levied his debt upon both the estates at the same time, but only for the deficiency, where one estate was not sufficient to satisfy the whole.

H. 1735, cor. Talbot, C.

Ex parte Rowlandson,

3 P. Wms. 405. 408.

2 Eg. Abr. 110. pl. 2.

Vide Ex parte Banks, 1 Atk.

106. Horsley's case, 3 P. Wms.

23. Ex parte Bond, 1 Atk. 98.

Ex parte Blankenhagen, Cook's

Bankrupt Law, 164.

(*a*) If three are jointly and severally bound the obligee cannot sue two of them jointly; for that would be suing them neither jointly nor severally. Roll. Abr. 148.

M. 1738, cor. Hardw. C.

Bowyer v. Swadlin,

1 Atk. 294.

1 Feb. 1739, cor. Hardw. C.

Simpson v. Vaughan,

2 Atk. 31.

14 Dec. 1739, cor. Hardw. C.

Primrose v. Bromley,

1 Atk. 90.

6 Aug. 1740, cor. Hardw. C.

Ex parte Banks, 1 Atk. 106.

2 Vef. 550.

Vide Ex parte Rowlandson,

antea, and 3 P. Wms. 405.

(*a*) Lord Chancellor founded

his order upon this reasoning, be-

cause the bond-creditors might have brought a separate action at law against each of them, and might

have had likewise separate executions, but could not have levied his debt upon both the estates at the

same time, but only for the deficiency, where one estate was not sufficient to satisfy the whole.

T. 1744, cor. Hardw. C.
Skip v. Edwards, 9 Mod. 438.

21. If *A.* takes a joint bond from *B.*, *C.*, and *D.*, and afterwards accepts the notes of *B.* and *C.* in discharge of the bond, equity will not afford *A.* relief against *D.* on the notes not being paid, *D.* being a mere surety, and not having received any part of the consideration money.

22 Jan. 1745, cor. Hardw. C.
Ex parte Bond and Hill,
 1 Atk. 98.

Ex parte Parminter and others,
 24 Dec. 1736, cor. Talbot, C.
Ex parte Abingdon and others,
 29 Mar. 1737. *Ex parte Banks*,
 6 Aug. 1740. all cited in S. C.
 and are in point; but in the principal case Lord Hardwicke ordered that the petitioners have time to look into the bankrupt's accounts, and see which will be the most beneficial estate to come upon in the first instance; which was not done in the cited cases.

In Hil. 1735 Lord Talbot allowed a bond-creditor a month's time to make his election upon the same principle. *Vide Ex parte Rowlandson, antea*, and 3 P. Wms. 405.

4 Feb. 1746, cor. Hardw. C.
Madox v. Jackson,
 3 Atk. 406.

23. There were three obligors in a bond: the obligee brought the principal and the representative of one of the sureties before the court stating by his bill that the third obligor was dead insolvent, wherefore he did not make his representative a party. On the circumstances of this case, an objection for want of parties was over-ruled.

Where a debt is joint and several, the plaintiff must bring each of the debtors before the court, because they are entitled to the assistance of each other in taking the account: besides, debtors are entitled to a contribution where one pays more than his share.

So, if there are different funds, as where the debt is by specialty, and the plaintiff may sue either the heir or executor; both must be made parties.

But there are exceptions to these rules; as where some of the obligors are only sureties, there is no pretence for the principal to say a surety should be brought before the court unless he had paid the debt. So where there are no personal assets, and that fact plainly appears in the cause, it is not necessary to bring the representative of the insolvent co-obligor before the court.

28 May 1748, cor. Hardw. C.
Skip v. Huey and others,
Wilcox v. Edwards,
 3 Atk. 91.

24. *H.* and *W.* were principals in a bond, and *E.* a surety only. The obligee agrees with *H.* to take four notes drawn by different persons, and payable at future days, in lieu of the bond, but compelled *H.* to sign an agreement in his own name,

name, and in the names of *W.* and *E.*, to pay the deficiency in case the notes should not produce the whole principal and interest on the bond. Before the notes became due, *H.* and *W.* became bankrupts; the obligee having received only 500*l.* on the notes, brought his bill for the residue of the principal and interest against *E.* as co-obligor. *Lord Hardwicke* had some doubt at first, but under all the circumstances of this case declared himself fully satisfied, that the plaintiff was not entitled to relief against *E.*

25. *S. G.*, tenant in tail, remainder to *O. G.* in tail, with other remainders, wanting to raise money for payment of the debts on his estate, proposed to *O. G.* to join with him in a mortgage for 1000*l.*, which he did; and both of them executed a bond; but *S. G.* received the money. The creditors of *S. G.* brought their bill to turn the mortgage debt on the real estate of *O. G.*, the remainder-man in tail, in exoneration of the personal estate of *S. G.*, which it was contended was the true intent of the transaction in all events; and that *O. G.* joined in the bond and mortgage to preserve his remainder, which *S. G.* would otherwise have destroyed by recovery. *Per Lord Chancellor*—If *O. G.* joined only as surety for his brother, and pledged his remainder; that is, turned it into a base fee merely as a surety, there is no colour that the personal estate of *S. G.* should be exonerated, for that would be to say the estate of the surety should exonerate the estate of the principal debtor. If that were the case the equity of *O. G.* would be, to have this specialty debt discharged out of the estate of *S. G.* against every body; nor could the creditors or legatees of *S. G.* say against that, standing in the place of their debtor, or have recourse back against his surety, to have his own estate exonerated, which the debtor himself could not have. There is no evidence in this case that *S. G.* intended to alter the succession, and bar his brother; he only wanted to induce the mortgagee to lend the money, by making an effectual mortgage, which distinguishes this case from that of an elder son preventing a recovery by his father. In this case *O. G.* had no consideration, nor was *S. G.* deprived of his power to suffer a recovery. Suppose an action brought on the bond or covenant in the mortgage against *S. G.* by the mortgagee, and that judgment ensued, *S. G.* could

20 June 1749, cor. *Hardw. C.*
Robinson v. Gtz,
1 Ves. 251.

It is a common case for a wife to join in a mortgage of her inheritance to secure her husband's debt. After the husband's death she is entitled to have her estate exonerated out of the real and personal assets of her husband, for the court considers her estate only as a surety for his debt, and none of the husband's creditors have a right to stand in the place of the mortgagee to come round the wife's estate.

It is now settled (though formerly doubted) that notwithstanding a tenant in tail has turned his estate into a base fee, he may by a recovery bar the entail on the rule as to recoveries in equity,

not

“that a person having the re-
demption remains in actual
possession.”

not in his lifetime come into equity against O. G., (the surety who lent his estate,) to indemnify him against this demand; *ergo*, none in his place could do so. Suppose also that the mortgagee had brought his action on the bond against O. G. alone, (the bond being joint and several,) and had got judgment, O. G. might have had relief against the estate of H. as his principal, in the place of the mortgagee, although he had no counter-bond. As to the consideration, whether there is any particular agreement to turn this debt entirely on the estate of O. G., (which it was contended was the true intent of the transaction in all events,) Lord Chancellor said, it was strange that O. G. should take the debt entirely on himself on so precarious a chance, when S. G. might still suffer a recovery. It was plain that S. G. was considered both by O. G. and himself as the principal debtor, and the facts seem contrary to any such agreements as is set up. It is therefore an attempt by persons standing in the place of the principal to turn this debt on the surety. Bill dismissed.

7 Dec. 1749, cor. Hardw. C.

Gammon v. Stone,

1 *Ves.* 339.

Vide Woffington v. Sparks, 2 Ves. 569.

26. A surety in a bond who pays the money due, is not to insist upon an assignment of it.

26 Mar. 1750, cor. Hardw. C.

Ex parte Williamson, 1 Atk. 84.

2 *Ves.* 249.

27. The allowance of a bankrupt certificate will not discharge his sureties, but they may be proceeded against notwithstanding such allowance.

Dec. 1750, cor. Hardw. C.

Ex parte Wildman, 1 Atk. 110.

2 *Ves.* 115.

Vide Ex parte Lefebvre, 2 P.

Wms. 407. *Ex parte Ryfwicke,*

2 *P. Wms.* 89.

28. An obligee may have several actions against each obligor, but shall not levy more than one satisfaction for his debt.

A creditor is entitled to come under a commission of bankrupt against all the obligors, drawers of notes, &c. till he is completely satisfied.

12 Dec. 1750, cor. Hardw. C.

Bishop v. Church, 2 Ves. 106.

29. A. and B. (partners) borrowed of C. two sums of 1000*l.* each at different times, for which they gave two joint bonds conditioned for payment by them or either of them. B. quitted the partnership, and died in 1740: C. died in 1747: A. became bankrupt; and the representatives of C. brought their bill against the representatives of B. for the whole debt. *Per Lord Chancellor*—Where a bill is brought for satisfaction of a duty out of assets, though the remedy may be at law, yet satisfaction will be decreed in equity. The bond in this case is joint on the face of it: then as to the severance

severance in the condition (a), that ought to be taken into the construction of the obligation, and make the obligation joint and several. In point of law the condition is only (if performed) an excuse against the penalty; but that is not a sufficient answer to the equity of the case. The joint obligation must be construed with that rule the law lays down, and the consequence of it, that the remedy survives by the death of one; yet still it is a joint security, that one or other of them shall do the act. Suppose a bond by a principal and his surety conditioned to be void if the principal pays the money. It cannot be contended that both are not bound. The construction the law puts on that obligation is, that the principal shall do the act; but if he does not, the obligation is on both. These words, therefore, which may amount to a severance as to the original contract, cannot enable the plaintiff to declare on such as a joint and several bond. It is immaterial to leave the plaintiff to take his chance at law; for it is a case turning on equitable circumstances. It was contended that the plaintiff came not as from a pure fountain, but was guilty of laches or collusion, which might rebut that equity set up beyond what the rule of law admits. Lord Chancellor therefore directed the cause to stand over, that defendant's solicitor might be examined as to the point of laches or collusion (b).

Upon the rehearing it was insisted, that the heir at law of B. not being named, was not bound; and that there was no instance of such a defect being supplied against him. *Sed per* Lord Chancellor—Where one obligor in a joint bond dies, and the other becomes a bankrupt, though the legal lien is gone, if no partiality or collusion by the obligee, equity will set up the demand against both the heir and executor of the deceased; but against the real, only in default of personal assets.

An obligee, unless paid, is not obliged to lend his name to sue the surviving obligor.

Though the obligations and penalty may be gone, the condition is considered in equity as an agreement to pay.

If one obligor pays and sues the other at law in the name of the obligee, payment may be pleaded; but not in the case of payment by a stranger, as representative of a deceased obligor in a joint bond.

(a) *Vide* Thomas v. Fraser, 3 Vef. jun. 399.

(b) Nothing of laches or collusion appeared upon examination of defendant's solicitor.

S. C. reheard 25 July 1751, 2 Vef. 371.

Vide Probat v. Clifford, Welch v. Harvey, cited.

Vide Aston v. Pierce, 2 Vern. 450.

28 Mar. 1751, cor. Hardw. C.
Ex parte Marshall and others,
 1 Atk. 262.

28 June 1754, cor. Hardw. C.
Greenside & al. v. Benson & al.
 3 Atk. 248.
Vide Baker v. Dumaresque,
 2 Atk. 66.

Lord Chancellor said the case of the sureties was not better than that of the principal, for as the verdict was obtained against the administratrix, who was the proper person to try it, it would be hard to have this tried over again in as many actions as the plaintiff's plea.

2 Aug. 1754, cor. M. R.
Woffington v. Sparks,
 2 Ves. 569.

As to the necessity or non-necessity upon the obligee to assign, *vide Gammon v. Stone,* 1 Ves. 339.

As to a surety compelling the obligee of a bond to call in his money when due from the principal debtor, *vide Lord Ranelagh v. Hayes,* 1 Vern. 190. *Nisbet v. Smith,* 2 Bro. Ch. Ca. 579.

30. An extent of the crown is taken out against the surety and co-obligor of a bankrupt, who pays the debt after disputing it some time, and being put to an expence thereby, he shall, notwithstanding he disputed the payment of a just debt, be admitted to prove the expences of such suit under the commission against the principal.

31. The plaintiffs were two sureties with Mrs. Hudson in an administration bond to the Commissary of York, who exhibited there an inventory of the testator's effects. The defendant Benson, being a creditor by bond of the intestate in the penalty of 600*l.*, brought his action against the administratrix, who pleaded that she had no assets, *ultra* 54*l.* Benson, not satisfied with the inventory, procured the commissary to assign to him the administration bond, and brought three actions upon it, one against her and one against each of the sureties, and assigned for breach of the bond, that Mrs. Hudson had not exhibited a true inventory: there was no defence, and judgment went by default. The administratrix and the sureties are bound by the verdict, and it is no excuse it was without defence, for that speaks a consciousness she had none. And the court ordered the verdict should stand as a security for so much of the account to be taken by the inventory as should fall short to satisfy Mr. Benson's principal and interest on the bond.

32. Plaintiff joined as security for another in a bond for payment of 150*l.*, and now brought her bill that the obligee might either put the bond in suit against the principal, or assign over the bond to her, that she might do it, as the principal obligor was declining in circumstances. *Per cur.*—The assignment could be of no use, for if the co-obligor paid off the bond, the principal might take advantage of that, and plead payment in bar of an action instituted by the plaintiff in the name of the obligee, as it must be, because the bond being given for payment of one sum of money, when that was satisfied to the obligee it was *functus officio*. There can be no occasion for this circuitous mode, for plaintiff may pay the money, and have the remedy in her own hands, by an action on the case, or, perhaps, by *indeb. assumpsit* on the implied contract. His Honor saw not sufficient ground to relieve the plaintiff upon any other than the

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the common terms against the penalty, as defendant was in the case of a common creditor.

33. *A.* and *B.* were bound in a bond to *C.* for the debt of *A.* When the bond became payable *C.* brought an action for the money against *A.* *A.* then negotiated with *C.* for further time, and upon *C.*'s consenting to give three years longer for payment of the money, *A.* executed a warrant of attorney to *C.* with a defeasance, as a collateral security. This transaction and agreement took place without notice to *B.* Whereupon *B.* filed his bill that he might be released from the bond as a surety. *Per* Lord Chancellor—Plaintiff complains of this transaction, as it gave a credit for three years longer than the bond imported, contrary to his inclination; and it seems that plaintiff *B.* not only never consented to this indulgence, but pressed *C.* the obligee to bring an action, which was brought and compromised without the privity of *B.* as surety. All the circumstances of this case shew that the principal debtor and his surety were jointly bound in the same bond; and the creditor has called on the surety to remain three years longer than he originally stipulated for, and compromised his action under an idea that the surety would comply. Although the prayer of the present bill was not so framed as to give particular relief, Lord Chancellor decreed a perpetual injunction against *C.* to restrain him from suing the plaintiff *B.* as a surety in the bond in question.

12 Mar. 1789, cor. Thurlow, C.
Nisbet v. Smith & al.
2 Bro. Ch. Ca. 579.

In Lord Ranelagh v. Hayes,
1 Vern. 190. equity compelled
the principal to pay the money
due on his bond, though the surety
was not sued; for the court
thought it unreasonable that a
man should always have a cloud
hang over him.

34. Bond by a trader to indemnify another who had been surety for him. If the surety pays part before the bankruptcy, and other part afterwards, the whole is proveable under his commission, if the bond was forfeited before the bankruptcy.

H. 1792, cor. Thurlow, C.
Ex parte Cockbott,
3 Bro. Ch. Ca. 502.

Bond to replace stock by a given
day, if forfeited before the bank-
ruptcy, is proveable. *Vide* *Ex*
parte Leitch, 22 Dec. 1792.

35. The defendant sued at law on an indemnity bond; the plaintiff filed his bill for an injunction, *without offering to make any recompence for the damage actually sustained.* The bill was dismissed, the remedy being at law on a *quant. damnicatus*.

H. 1795, in Scacc.
Godbolt v. Watts, 2 Anstr. 543.

36. "*I return A. his bond,*" in a will, is not a release but a legacy; and having lapsed, the bond remains in force against a surviving co-obligor.

22 July 1796, cor. Loughb. C.
Mauland v. Adair,
3 Ves. jun. 231.

37. *A.* and *B.* (partners) became jointly bound to *C.*; conditioned, *that if A. and B., their heirs,*
executors,

19 June 1797, cor. Loughb. C.
Thomas v. Fraser, 3 Ves. jun. 399.

Vide Bishop v. Church, 2 Vef. 206. 371.

executors, or administrators, or any of them, shall and do well and truly pay, &c. Per cur.—This bond is joint and several.

29 Jan. 1798, cor. Loughb. C.
Burn v. Burn, 3 Vef. jun. 573.
Vide Ball and Dunster ville,
4 Term Rep. 313.

38. A joint bond held several *against creditors* (where it appeared and was admitted to be the intention of the parties that it should be several as well as joint) in the administration of assets; and an account directed upon it and to be paid in a course of administration as a specialty debt

See more *post*, tit. *Surety*.

Sec. 10. Of Bonds obtained by Duress, Fraud, or Misrepresentation from Persons of weak Minds, not conscious of their Right, under Dread or Influence, or in a State of Intoxication.

T. 1709, cor. Cowper, C.
Goodman v. Scuse, MS Rep.
2 Eq. Abr. 183. pl. 2.

Vide Earl of Arglais v. Muschamp, 1 Vern. 75. Nott v. Hill, 1 Vern. 167. Earl of Arglais v. Pitt, 1 Vern. 219. Berny v. Pitt, 2 Vern. 14. Twissleton v. Griffith, 1 P. Wms. 310. Curwyn v. Milner, 3 P. Wms. 292. (n.) Cole v. Gibbons, 3 P. Wms. 250.

The party must be fully apprised of his right to be relieved against the original transaction. *Vide* Cole v. Gibson, 1 Vef. 503. Earl of Chesterfield v. Janffen, 1 Atk. 301. 2 Vef. 125. Taylor v. Rochfort, 2 Vef. 281. Crowe v. Ballard, 3 Bro. Ch. Ca. 117. 1 Vef. jun. 215.

(a) But upon the defendant's answer, and the proofs this did not appear, but only that the defendant took the plaintiff's cloaths and threatened to throw them out of doors if he did not go away.

1. Plaintiff and defendant having been at a fair together, about ten o'clock in the morning came to defendant's house. Defendant went out, and his wife went up stairs with plaintiff in order to put him to bed, he being (as was suggested in the bill) very drunk. Defendant when he returned found plaintiff in his shirt sitting on the bed, and his wife lying upon it crying. The bill also suggested, that the defendant took up an axe, and swore that he would kill the plaintiff (a); upon which the plaintiff (being under terror) told the defendant he would give him any satisfaction. Whereupon it was agreed that he should give defendant all the money he had in his pocket, which was 16*l*., and a note for 500*l*. payable by 50*l*. *per ann*. A witness was called in to see the note signed; and the plaintiff told him it was a bargain for grafts. Defendant about three days after told plaintiff, that if he did not give him a better security, he would put the note in suit; whereupon the plaintiff gave a bond for the payment of 500*l*., with a warrant of attorney to confess judgment, and which was accordingly confessed. Afterwards the plaintiff fearing execution upon the judgment, surrendered a copyhold for a further security. Plaintiff was taken in execution upon the judgment, and to be relieved he brought his bill. Lord Chancellor—This was a voluntary act of the plaintiff; and done, being conscious of himself that he had done amiss.

And it seems he was sober when he gave the note, for he told the witness it was a bargain for grass, so that he was willing to conceal the truth; which excuse he had not been capable of making if he had been so drunk as the bill suggests. If a jury had given damages in this case in an action at law for entering his house, &c. this court would not have relieved against the damages; and his giving so many repeated assurances upon deliberation, makes it stronger than any verdict; for it is so many confessions that the defendant was injured to that damage; and nothing is so strong an evidence against a man as his own act. His lordship dismissed the bill, but without costs; saying, plaintiff had made himself a hard bargain.

Defendant coming home finds the plaintiff naked, and just going to bed to his wife; he thereupon gets a note from him for 500*l.*, which was in *June*; and in *August* the plaintiff gives him a judgment; and in *October* following surrenders copyhold lands to him by way of further security. The plaintiff brought his bill to have the several securities delivered up, alledging a contrivance to catch him in that manner; that he was drunk, and did not know what he did; and that defendant with an axe threatened to cut him in pieces, so that he was under terror; and that defendant himself had said in company that the securities were for money lent. Lord Chancellor observed, there was no proof of a plot to catch the plaintiff in this manner, nor that he appeared to be so disordered or frightened; for he continued in the same mind when he was in cool blood, at the several times of giving the three different securities: and it was proved that he joined with the defendant in giving out that the note was for a bargain of grass, so that he knew what he was about, and had a mind to conceal it; and that the defendant's saying in company it was for a bargain of grass, made the plaintiff's equity the worse; for it was a sign the defendant was so just as to keep it a secret, which was certainly the intent of the bargain it should be. If a jury in this case had given damages, this court would not relieve; and why should it, when the plaintiff himself had three times given and ascertained damages against himself, so dismissed the bill without costs, because the defendant had bragged of his bargain, which was a sign he thought himself rather overpaid; and

S. C. as reported in Gilb. Eq. Rep.

If a bond is obtained by force or terror, though not so as to make it *per dures*, it ought to be set aside, or at least not to be carried into execution in equity. *Visc. Attorney-General v. Sothom*, 2 Vern. 497.

therefore Lord Chancellor said he would relieve against the penalties.

T. 1709, cor. Cowper, C.
Anon. MS case,
 3 P. Wms. 294. n.
 2 Eq. Abr. 183. pl. 2.

2. One being caught in bed with another's wife, gave the husband who caught him, and having a sword in his hand was about to kill him, a note for 100*l.*, payable at a certain time; after which, the money growing due, he who gave the note excusing payment, gave his bond for the money: had the matter rested solely on the note which was thus gained by a man armed from one naked, and by duress, (notwithstanding it happened to be given in satisfaction for the greatest injury,) equity would have relieved: but when the party had afterwards coolly, and without any pretence of fear, &c. entered into a bond to the husband, he thereby ascertained the damages, and was not entitled to relief.

T. 1719, cor. Parker, C.
Hancock v. Hancock,
 10 Mod. 438, 9.
 2 Eq. Abr. 219. pl. 5.
 5 Vin. Abr. 295. pl. 43.

3. *A.*, upon his marriage, entered into a bond with *B.*, that if he died without issue by his marriage, he would leave 3000*l.* to one or more of the children of his elder brother, who had married *B.*'s daughter. *A.* died without issue, having given in his lifetime, and by his will, more than 3000*l.* to one of those children, but without any declaration that these gifts were designed in satisfaction of his bond; because, as he said, (when advised to make such a declaration,) that it would look like complying with the bond, which had been extorted from him by the threats of *B.* In the will there was also a recital of the fraud made use of in obtaining the bond; but no other evidence of that fraud appeared. Lord Chancellor would not allow the recital in the will to overthrow the bond; but decreed, that the gifts should be taken in satisfaction of the bond, since it sufficiently appeared the obligor never intended to make those gifts over and above the satisfying the bond, which was of 50 years standing.

M. 1737, cor. Jekyll, M. R.
Cymond v. Fitzey and another,
 3 P. Wms. 130.
 2 Eq. Abr. 136. pl. 8.

4. The Duke of *C.* employed plaintiff to attend Lord *S.*, his infant son, on his travels, that he might not be imposed upon. When Lord *S.* returned, plaintiff continued in his service; and when his lordship was 27 years of age, plaintiff prevailed on him to give him a bond for 1000*l.*, which was kept secret from the Duke his father. Lord *S.* was a person of weak understanding, and unable to raise money to pay the bond. A bill was brought

brought by plaintiff for payment of the bond; and a cross bill was filed to be relieved against it. The bond was given voluntarily, as a reward for plaintiff's care of the young lord during his travels.

Per cur.—Where a weak man gives a bond, if it be attended with no fraud or breach of trust, equity will not set it aside merely for the weakness of the obligor (a), if he be *compos mentis*; neither will equity measure people's understandings or capacities (b), there being no such thing as equitable incapacity where there is a legal capacity. But where no consideration appears, nor is not even pretended to be given, equity will relieve against such a bond. In the present case a trust was reposed in a servant to take care of an heir, and prevent his being imposed upon, and that servant himself imposes on his charge. It was objected, that the servant's trust continued only during the young lord's travels; but held that it remained so long as the plaintiff continued in his master's service. While the young lord was an infant the law took care of him; and when he became of age, he stood more in need of the protection of his servant. A breach of trust is evidence of the greatest fraud; and 1000*l.* was an exorbitant gift for one who had no means to pay. The secretion of the bond from the Duke was an evidence of fraud; and young heirs, even when of age, are under the care of a court of equity: wherefore this case, though new, comes within the rules (c) of equity. Decreed the bond to be released, since plaintiff, in his answer to the cross bill, swore the bond was mislaid.

111. *Thornhill v. Evans*, 2 Atk. 330. *Heathcote v. Paignon*, 2 Bro. Ch. Ca. 156. where advantage was taken of necessity, or of surprise, as in *Evans v. Llewellyn*, 2 Bro. Ch. Ca. 150. See also cases of transactions between guardian and ward, or persons between whom a similar confidence has subsisted, as *Duke of Hamilton v. Mahon*, 1 P. Wms. 118. *Coig v. Gibson*, 1 Vef. 503. *Griffin v. Deveuille*, in Ch. 16 Nov. 1781. (where plaintiff having lived for some time before he became of age with his sister and her husband, the court set aside securities obtained by the husband from the plaintiff after he became of age, considering the husband as much answerable to a court of equity as a guardian. See also cases between parent and child, as *Gliffon v. O'Keden*, 2 Atk. 258. and 3 Bro. P. C. 560. *Cocking v. Pratt*, 1 Vef. 400. *Hawes v. Wyatt*, 3 Bro. Ch. Ca. 156. See also cases of bargains with heirs apparent, &c. for their expectations, *Twisleton v. Griffith*, 1 P. Wms. 310. See more, *post*, tit. *Fraud, Heir.*

(a) The having been in drink is no reason to relieve a man against a deed or agreement gained from him in that state. *Secus* if he were drawn in to drink by the man who gained the deed from him. *Vide Johnson v. Medicot*, 29 May 1734.

(b) In *Griffin v. Deveuille*, 16 Nov. 1781, Lord Chancellor observed, that in almost every case upon this subject a principal ingredient was a degree of weakness short of legal incapacity, and that in the principal case no relief would probably have been given if the court had not considered Lord S. as more liable to imposition than the generality of mankind.

(c) *Vide Clarkson v. Hanway*, 2 P. Wms. 203. where advantage was taken of weakness of mind, and *Bosquet v. Dashwood*, Ca. temp. Talb. 38. *Proof v. Hines*, Ca. temp. Talb. Bro. Ch. Ca. 167. *Hawes v.*

5. Bill to impeach some bonds obtained by fraud and imposition. *Per cur.*—The production of a bond is good evidence of a debt *primâ facie*; but where fraud appears, the obligee ought to prove actual payment, even though he should thereby lose part of the money, for that would be but a just punishment for the fraud.

T. 1734, cor. Talbot, C. *Piddock v. Brown*, 3 P. Wms. 289.

T. 1735, cor. Talbot, C.
Proof v. Hines,
 Ca. temp. Talb. 111.
 2 Eq. Abr. 186. pl. 9.

6. Plaintiff, a poor man and illiterate, suing for an estate, gave a bond for 1000l. to the defendant, who assisted him with small sums, and took some pains in the affair. The bond was obtained by pressing the plaintiff for payment of what was expended, and taking advantage of his insolvency. Lord Chancellor decreed the bond to stand as a security only for so much as had been actually laid out, with interest; and left the defendant at liberty to bring *quantum meruit* for his pains and trouble.

13 July 1790, cor. Thurlow, C.
Crowe v. Ballard,
 3 Bro. Ch. Ca. 117.
 1 Ves. jun. 220.

Vide Norris v. Rodd, 16 Mar. 1779, cited in the principal case, which seems to have been determined on the same principle.

(a) Lord Chancellor said, he had attended formerly to the reason of the word "*confirmatio*," and had been at a loss for the principle upon which the courts have spoken of such transactions as these subsequent to the demand arising as a confirmation.

7. An agent employed to sell a reversionary legacy, buys it in the name of another, and afterwards sells it to the legatee for a bond payable after his father's death, and then obtains from him a money-bond. The whole transaction is fraudulent; and the subsequent bond is no confirmation (a) of it, though interest was paid upon it for four years, because such subsequent bond was given under the idea that the obligor was bound by the former transaction. Decreed, that all the deeds should be set aside, and an account taken.

Where a bond is given at full age, and the obligor is not in distress, if the obligor executes the bond under a notion of honour, and an actual advance of money has been made to him, this will maintain the former bargain, however disadvantageous. But where such a bond is not given freely, or if executed under distress, terror, or apprehension from the former transaction, the subsequent act is no confirmation, even though the apprehensions be unfounded.

For this class of cases, see more under tit. *Heir*, catching Bargains; *Post obit Contracts*, *Deeds*, *Frauds*.

Sec. 11. Of Bonds concealed, suppressed, lost, or cancelled.

T. 1683, cor. North, C. S.
Anon. 1 Vern. 180.

The constant distinction now is, that where a bill is merely for a discovery of a lost deed or instrument no affidavit is necessary;

but if the plaintiff seeks to change the jurisdiction by praying relief also, then an affidavit to prove the loss must be filed with the bill. *Vide* Godfrey v. Turner, 1 Vern. 247. Nicholson v. Pattison, 1 Vern. 310. *Anon.* 1 Vern. 180. *Anon.* Prec. in Ch. 536. *Anon.* 3 Atk. 17. Dormer v. Fortescue, 1 Atk. 132. Rootham v. Dawson, 3 Anstr. 859. Whitchurch v. Golding, 2 P. Wms. 541. Woodcock v. King, 1 Atk. 286.; and there is but one case to the contrary, which is *Anon.* 1 Vern. 59. in 1683. There is a wide difference between the loss of a bond and a note, for at law a *profect in curia* of the bond itself must be made, otherwise oyer cannot be demanded by defendant; and if oyer be not given,

1. WHERE a man brings a bill for discovery of a bond, he need not make oath he has lost the bond, as he must do if he seeks relief for the duty.

given, plaintiff cannot proceed. *Vide Walmley v. Child*, 1 Ves. 344. In cases of a personal demand, as where a bond is lost, discovery alone is not sufficient, plaintiff must also pray to be paid the money due, consequently an affidavit must be annexed to the bill, for by that prayer the jurisdiction is completely changed from a court of law to a court of equity. 1b.

2. A voluntary bond by the husband after marriage to make a jointure on his wife, he makes a jointure, and the wife gives up the bond; the jointure is evicted; the widow (there being no other debts) shall have her jointure made good out of the personal estate; and the giving up of the bond by the wife during her coverture shall not bind her.

bond was delivered up. For an agreement, though voluntary, under hand and seal, ought to be decreed in equity.

3. If *A.* be bound in a bond for payment of money, and *B.* be bound with him as his surety only, and the bond happens to be lost, equity will set up the bond as well against the surety as against the principal, because the bond was once a legal charge against both.

4. *J. S.* a little before his death entered into a voluntary bond to his housekeeper for the payment of an annuity of 30*l.* per ann.; and the bond being lost, his representatives were decreed to pay the annuity, or the penalty of the bond, though it appeared that there were no wages due to her (*a*).

5. *A.* gave three bonds to *B.* for 500*l.* each, payable at different times. The two first were paid, but upon the parties settling an account, relative to other matters, the third bond was delivered up by mistake, instead of a particular voucher belonging to that account. Equity relieved against this mistake, by directing an issue to try whether there were two bonds or three, and whether the last bond was paid or not; and upon appeal to the Lords, the court of Chancery was left at liberty to proceed on the issues so directed as might be just.

6. A bond given by the husband before marriage to permit his wife to dispose of her separate estate, and cancelled by him, subsists in point of law, and the benefit of it was decreed for her executor.

Vide Smith v. Avery, 1 Eq. Abr. 269. pl. 9.

7. The obligor on payment of 20*l.* to the obligee, a weak man, procured a bond and notes for money to be delivered up to him, upon pretence that he was poor, and nearly related to the obligee; but neither of those considerations being proved,

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H. 1686, cor. M. R.

Beard v. Nuttall,

1 Vern. 427.

1 Eq. Abr. 22. pl. 6.

The plaintiff was also entitled to dower, to recover which she was left at liberty to proceed, and what the dower should fall short in value of the jointure should be retained by her out of the value of the estate, notwithstanding the

1700, Canc.

Sheffield v. Lord Castleton,

1 Eq. Abr. 93. pl. 6.

2 Vern. 293. S. C. but not S. P.

H. 1700, Canc.

Ligbtbone v. Weeden,

1 Eq. Abr. 92. pl. 5.

(a) Equity relieves against accidents. Max.

24 Jan. 1706, Dom. Proc.

Vantoven v. Girique, Widow

and Administratrix,

1 Bro. P. C. 134.

11 July 1725 cor. M. R.

Cowry v. Richardson, MS. case

in Lib. Reg. A. fo. 491, 492.

cited in *Paulet and Delaval*,

2 Ves. 670.

M. 1725, Canc.

Lucas, Executor, v. Adams,

9 Mod. 113.

2 Eq. Abr. 6. pl. 11. 482. pl. 23.

he

he was decreed to account for the bond and notes.

H. 1726, Canc. rules on motion
by King, C.
Agan. Gibb. Eq. Rep. 183.

8. A bond for performance of articles, though cancelled, was made an exhibit, and allowed as evidence to prove the execution of the articles, the limitation being inserted and recited in the condition of the bond.

28 Feb. 1718, cor. Hardw. C.
Atkins v. Farr, 1 *Atk.* 287.
2 *Eq. Abr.* 247. pl. 32.
5 *Vin. Abr.* 296. pl. 3.

9. One *Farr* gave *Mary Atkins* a bond, in penalty of 1000 *l.*, on condition that if he did not marry her within 12 months after date, he would pay her 500 *l.* Soon after, under pretence of reading it, he took it against her consent, and carried it away with him; whereupon she brought a bill for the delivery of the old bond, or, if cancelled, that he might execute a new one. *Mary Atkins* dying intestate, her mother, who as her administratrix was entitled to the 500 *l.*, revived against the defendant *Farr*. The plaintiff's equity, said the court, was the bond's being gone by the default of the defendant, and therefore the plaintiff is entitled not only to a discovery, but relief by payment of the money: and *Farr* was accordingly decreed to pay what was due for the principal sum of 500 *l.* in the condition of the bond, with interest for the same at the rate of 4 *l.* per cent. from the day of filing the original bill.

11 May 1744, cor. Hardw. C.
Snellgrove v. Baily, 3 *Atk.* 214.
Vide Walmley v. Child, 1 *Ves.*
344.

10. Though evidence may be given at law of a deed that is lost; it is otherwise with respect to a bond, for a *profect in curia* must be made of it.

28 May 1744, cor. Hardw. C.
Skip v. Huey, Wilcox v. Edwards,
3 *Atk.* 91.

11. Where a bond is burnt or cancelled by accident or mistake, or where a principal procures it to be delivered up by fraud, equity will set it up against a surety though extinguished at law.

29 Ap. 1751, cor. Hardw. C.
Blanchet v. Foster, 2 *Ves.* 264.

12. Bill by a husband after his wife's death to be relieved against a bond given by her to her aunt just upon her marriage, for valuable consideration, though concealed from her husband, it is no fraud on the marriage, (yet such concealments are not to be encouraged,) a consideration being positively sworn to in the answer. The bill was dismissed with costs. Lord Chancellor would have excused the husband the costs, but he was his wife's administrator, and it was sworn that the concealment was at the wife's request, therefore had she survived she could not have said her aunt should lose her costs.

§ 11. *Lost, concealed, or cancelled.*

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13. It is the peculiar province of courts of equity to give relief in all cases of fraud, or of contracts in which any advantage is unduly taken, by either of the parties, of the distress or necessity of the other: and therefore where *A.* purchases an estate of *B.* for 1000*l.*, and gives his bond for part of the purchase-money, and afterwards unfairly gets the bond into his own possession, a court of equity will oblige him to pay the principal and interest thereby secured.

22 Feb. 1773, Dom. Proc.
Kinrick, Eq. and another v.
Hudson & al.
6 Bro. P. C. 614.

See more *ante*, sect. 5. *Post*, tit. *Deeds*.

Sec. 12. Of the Assignment of Bonds,
and the Situation of the Assignee.

1. *A.* Is bound in a bond to *B.* for payment of money; *B.* assigns it to *C.* in satisfaction of a debt; *B.* becomes bankrupt, and a commission is taken out against him. *C.* in equity is well entitled to the bond, for as the bankrupt himself was bound by his assignment, so those claiming under the commission cannot be in a better case than the bankrupt himself was.

H. 1701, cor. Wright, C. S.
Peters & al. v. Soame & al.
2 Vern. 428
1 Eq. Abr. 44. pl. 3.

It was insisted that *B.* was a bankrupt before he assigned the bond. Lord Keeper directed an issue as to that point.

A. owes money to *B.* by bond; *B.* owes money to *A.* for rent; *B.* assigns the bond for a valuable consideration to *C.*; *B.* becomes bankrupt. Whether *C.* shall retain the rent due to him from the bankrupt out of the bond? *Quere.*

Lord Keeper doubted whether *A.* might not retain for his debt, and thought stoppage incumbered to be a good equity in such case.

2. Payment to the obligee after notice of the assignment of a bond is not good.

H. 1705, cor. Cowper, C. S.
Baldwin v. Billingsley,
2 Vern. 559.

3. *A.* together with *B.* and *C.* as his sureties executed a bond to *D.* for securing 300*l.* and interest; the debt is paid by *C.* with the proper money of *A.*, but *C.* neglects delivering up the bond to *A.* to be cancelled. *C.* afterwards procures this bond to be assigned as a collateral security for debt of his own. Held, that this assignment was a gross fraud in *C.*, and a perpetual injunction was granted to restrain all further proceedings on the bond.

19 Jan. 1709, Dom. Proc.
May v. Norman, Esq.
1 Bro. P. C. 271.

4. An assignee of a bond must take it subject to the same equity as it was in the obligee's hands.

T. 1715, cor. Cowper, C.
Coles v. Jones, 2 Vern. 692.
M. 1713, *Turton & Benson.*
Richardson & al. v. Benson, 2 Vern. 765. 2 Eq. Abr. 87. pl. 7.

H. 1731, cor. Macclesfield, C.
Ex parte Lee, 1 P. Wms. 782.

P. 1731, in Cane.
Medico's case, 2 Stra. 899.
Ca. temp. King, by W. Kel. 6.
Vide Ex parte Hyllard, 1 Atk.
 347. 2 Vef. 407. *Ex parte Lee*,
 1 P. Wms. 782.

M. 1738, cor. Hardwicke, C.
Bower v. Swadlin, 1 Atk. 294.
Vide Ex parte Smith, 1 P.
 Wms. 237. 2 Eq. Abr. 304.
 pl. 1. where an obligee sued a
 co-obligor, and after taking him
 in execution on a *ca. sa.* received
 24 l. and discharged him; the
 obligee, however, was afterwards
 admitted a creditor for half the
 debt under a commission against
 the other obligor, and it seems he
 would have been admitted a cre-
 ditor for the whole, but that the
 co-obligor who was sued was only
 a surety. *Vide Ex parte Ryfwicke*,
 1 P. Wms. 89.

30 Oct. 1740, cor. Hardw. C.
Baker and others v. Dumaresque,
 2 Atk. 66.

Vide Greenfield v. Benson,
 3 Atk. 248.

(a) *Vide Archbishop of Can-
 terbury v. Wilk*, Salk. 315. where
 this point was solemnly deter-
 mined in B. R.

14 Dec. 1741, cor. Hardw. C.
Brace v. Harrington, 2 Atk. 235.

5. An assignee of a bond (not being a legal creditor) cannot petition for a commission of bankruptcy.

6. A commission of bankrupt was superseded because granted upon the petition of an assignee of a bond, who though an equitable is no legal creditor.

7. A release to one obligor is a release to both in equity as well as at law, but if there be an assignment of the bond in trust for the benefit of others precedent to the release, though without consideration, it will be a material question whether the obligee could release, or if it could operate to the releasee, as he must be presumed to have notice of this assignment, being himself a trustee in the assignment; and every man is supposed to be consulant of a deed to which he is a party. Lord Chancellor directed this cause to stand over till it should be made appear whether the date of the release was precedent or subsequent to the assignment.

8. A creditor cannot take an assignment of a bond given by an administrator (a), (pursuant to the statute of distributions,) to administer faithfully, and exhibit an inventory, &c., nor will an action lie upon it, though assigned for a breach that he was indebted to the assignee in the sum of 200 l. upon specialty.

9. It is not necessary in every case of assignments, where all the equitable interest is assigned over, to make a person who has the legal interest a party; but if an obligee has assigned over a bond, and a presumption of its being satisfied arises from the great length of time, as in the present case, where the bond was given by Sir J. H.'s father in 1709, and assigned over in 1717, and no demand has been made in twenty-two years till the bringing of this bill by the assignee in 1739, the cause must stand over to make the representative of the obligee a party, because it is possible the obligee himself may have been paid, and therefore necessary to have an answer as to that particular either from him or his representative.

26 Oct. 1748, cor. Hardw. C.
Lill v. Caillieu, 1 Vef. 122, 123.

10. The assignee of a bond takes it subject to all equity in the hands of the original obligee, but
 time

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time and circumstances may make the case of an assignee stronger.

11. The plaintiffs were two sureties with Mrs. *Hudson* in an administration-bond to the commissary of *York*, who exhibited there an inventory of the testator's effects. The defendant *Benson*, being a creditor by bond of the intestate in the penalty of 600 *l.*, brought his action against the administratrix, who pleaded she had no assets *ultra* 54 *l.* *Benson*, not satisfied with the inventory, procured the commissary to assign to him the administration-bond, and brought three actions upon it, one against her and one against each of the sureties, and assigned for breach of the bond, that Mrs. *H.* had not exhibited a true inventory. There was no defence, and judgment went by default. The administratrix and the sureties are bound by the verdict, and it is no excuse it was without defence, for that speaks a consciousness she had none. And the court ordered the verdict should stand as a security for so much of the account to be taken by the inventory as should fall short to satisfy Mr. *Benson's* principal and interest on the bond.

12. Plaintiff in 1769 executed to one *M.* three bonds for 5000 *l.* each, payable in three months with interest. *M.* assigned these bonds to *P.*, and *P.* to defendant. Defendant brought actions in the name of *M.* Plaintiff filed an injunction bill against all the parties to stay proceedings in the action, stating, that his three bonds were given for the accommodation of *M.*, who gave him a counter-bond of indemnity, and that the assignments were without consideration, and antedated for the purposes of fraud. Defendant by answer admitted the counter-bond, but denied all collusion or want of consideration, and stated his account with *P.* *P.* put in his answer, corresponding with that of defendant, and stated the assignment from *M.* to him to be in consideration of a fair debt. Plaintiff's injunction was dissolved on the merits.

13. Defendants *E.* and *R.* entered into a bond of 500 *l.* to defendant *H.* for securing 250 *l.*, and took from *H.* a counter-bond. Afterwards *H.* borrowed 100 *l.* of one *C.* on his own note, and deposited *E.* and *R.*'s bond as a security (which he afterwards assigned). The 100 *l.* not being paid, *C.* filed his bill, praying that defendants *E.* and *R.* might pay plaintiff his 100 *l.* out of the money secured

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23 June 1754, cor. Hardw. C.
Greenfield & al. v. Benson & al.
3 Atk. 248.

Vide Baker v. Dumaresque,
2 Atk. 66.

Lord Chancellor said the case of the sureties was not better than that of the principal, for as the verdict was obtained against the administratrix, who was the proper person to try it, it would be hard to have this tried over again in as many actions as the plaintiffs please.

23 June 1772, Scacc.
Lord Shelburne v. Tierney, MS. ca.
cited 1 Bro. Ch. Ca. 435. (n.)

9 Mar. 1785, cor. Thurlow, C.
on appeal from a decree of the
Lds. Comrs.
Cator v. Burke & al.
1 Bro. Ch. Ca. 434.

cured by the bond. The bond appeared to be given for the purpose of satisfying the creditors of *W.*, a relation of *E.* and *R.*, between whom and defendant *H.* there was an account; and there was also an account subsisting between defendants *E.* and *H.* *Per cur.*—The bond of *E.* and *R.* can never be considered other than as an unassignable security; it is a different case from a bond given to be deposited with *C.* Plaintiff has mistaken both the law and equity, first in supposing he could have a different relief in equity than at law; and secondly, that if there had been fraud in giving the counter-bond, it could not be made use of at law. If this bill would lie by the simple act of assigning the bond, a suit in equity might be brought on every bond that is given.

M. 1789, cor. Thurlow, C.

Ray v. Fenwick,

3 Bro. Ch. Ca. 25.

(a) Though this is not a case of actual dismissal for want of parties, the Lord Chancellor's suggestion seems dissonant from the present practice. In *Stafford v. Civ. London*, 1 P. Wms. 428. Lord Parker said, where a bill wanted proper parties, it was discretionary in the court either to dismiss the bill without prejudice to another bill, or allow an amendment on payment of costs; but in *Anon.* 2 Atk. 15. Lord Hardwicke said a bill was not dismissible for want of parties. A decree of Sir Joseph Jekyll's to dismiss a cause at the Rolls for want of parties was reversed, and a decree of the same nature in the Exchequer (1) was likewise reversed in the Lords. And in *Jones v. Jones*, 3 Atk. 111. Lord Hardwicke said, that though the rule was to make the objection for want of parties at the hearing, yet the court had been frequently compelled to let a cause stand over for want of parties after it had been thoroughly heard, as in that case, where, though the objection was made very late, Lord Hardwicke said it must have its weight, otherwise he should be obliged to dismiss the bill, which was never done lately, though it was attempted by Sir Joseph Jekyll formerly, but reversed on appeal to Lord King; and since that time, said Lord Hardwicke, causes are ordered to stand over on paying the costs of the day, that the plaintiff may have an opportunity of making proper parties.

(1) This appears to be the case of *Green v. Poole*, 4 Bro. P. C. 122.

16 May 1798, cor. Loughb. C.

Hammersley v. Purling,

3 Vef. jun. 757.

14. Defendant gave a bond to *J. S.*, who assigned it to plaintiff, and died without a representative. Motion on the part of plaintiff for a *ne exeat regno* against defendant, on the usual affidavit, and in order to give plaintiff time to administer to *J. S.* Lord Chancellor refused the writ, because the suit without a representative of the original obligee *must be dismissed (a) for want of parties.*

15. A bond assigned as security for money paid to the use of a person who had committed a secret act of bankruptcy cannot be retained against the assignees under the bankruptcy.

Sec. 13. Of the Interest-Monies due on Bond: And herein of general Payments made in Exoneration of a Bond-Debt, and of the Cases where the Court will or will not go beyond the Penalty.

1. **E**quity will in some cases carry a debt beyond the penalty, as where a man is kept out of a debt by an injunction to stay proceedings at law; but a plaintiff in equity cannot charge the defendant beyond the penalty any more than he can at law.

M. 1685, Cane.
Hale v. Thomas, 1 Vern. 350.
Vide 2 Ch. 182. 186.

2. *A.* was bound to *B.* in 1000*l.* for payment of 500*l.* *A.* and *C.* as his surety afterwards gave bond to *B.* of 200*l.* for payment of 100*l.* as a farther security for so much of the 500*l.* Then *A.* assigned a judgment to *B.* of 500*l.* towards farther satisfaction of the debt, and *B.* received several sums on this judgment. *A.* by consent of *B.* received 80*l.*, other part of the money secured on this judgment. This shall not go in exoneration of any part of the money secured by the 200*l.* bond, which it would have done if *B.* had actually received it and lent it to *A.*

M. 1701, cor. Wright, C. S.
Halford v. Byron,
Proc. in Ch. 178.
2 Eq. Abr. 188. c. 1.

3. A man has judgment for the penalty of a bond. Though the principal and interest exceed the penalty, yet he shall recover no more, for a man can have no more than his debt, and the penalty is the utmost of the debt.

T. 1705, cor. Cowper, C. S.
Steward v. Rumball, 2 Vern. 509.
To this decision the reporter makes a query.

4. *A.* being indebted to *B.* and *C.*, executed to them two several bonds in the penalty of 150*l.* each, and soon afterwards they obtained judgments on these bonds for the penalties and costs. *B.* and *C.* filed a bill against the representative of *A.* for a satisfaction (out of the real assets) of the money due on these judgments, with interest for the same; but it was held, they were not entitled to interest.

9 Ap. 1720, Dom. Proc.
Ellis, Esq. v. Whinnery,
2 Bro. P. C. 159.

5. But where advantage is made of the money, interest shall be carried beyond the penalty.

24 May 1720, Dom. Proc.
Lord Dunfany & al. v. Plunkett,
Widow, 2 Bro. P. C. 251.
2 Eq. Abr. 533. pl. 1. 14 Vin. Abr. 460. pl. 3.
Vide *Elliot v. Davis*, Bunb. 23.

6. A

1 May 1721, Dom. Proc.
Corporation of Gt. v. Russell,
 Esq. 2 Bro. P. C. 275.
 14 Vin. Abr. 460. pl. 4.
 2 Eq. Abr. 533. pl. 2.

27 June 1721, Dom. Proc.
Kirwan, Esq. v. Blake, Bart.
 2 Bro. P. C. 333.
 14 Vin. Abr. 460. pl. 4.
 2 Eq. Abr. 533. pl. 3.

M. 1735, cor. Talbot, C.
Bosquant v. Dabwood,
 Ca. temp. Talb. 38.
 2 Eq. Abr. 58. pl. 10.

4 Nov. 1743, cor. Hardw. C.
Bromley and others v. Goodere,
 Assignee, 1 Atk. 75. 77. 80.

H. 1744, cor. Hardw. C.
Wilkinson v. Sterne, 9 Mod. 427.

H. 1792, cor. Thurlow, C.
Tew v. Earl of Winterton,
 3 Bro. Ch. Ca. 489.
Knight v. Maclean, 3 Bro. Ch. Ca. 496.

H. 1795, in Scacc.
Lloyd v. Hatchett, 2 Anst. 525.
Vide Tew v. Lord Winter on,
 3 Bro. Ch. Ca. 492. *Coleman v.*
Winch, 1 P. Wms. 776. *Mor-*
rett v. Parke, 2 Atk. 53. *Archer*
v. Snatt, Stia. 1107.

6. A court of equity will not carry interest beyond the penalty of a bond, where the demand is stale, and appears to have been neglected for many years.

7. But interest may be carried beyond the penalty, where the bond is only taken as a collateral security.

8. Plaintiffs being assignees under a commission of bankruptcy against J. S., brought their bill against defendant as executor of D., who had lent J. S. several sums upon bonds, at 6l. per cent. interest; and had taken advantage of his necessitous circumstances, and compelled him to pay 10l. per cent., to which he submitted, and entered into agreements for that purpose. Decreed at the Rolls, and affirmed by Lord Talbot, that the defendant should account; and that for what had been really lent legal interest should be allowed, and what had been paid above legal interest should be deducted out of the principal at the time paid: plaintiffs to pay what should be due; and if the testator had received more than was due with legal interest, that was to be refunded by defendant, and the bonds to be delivered up.

9. Where a bankrupt's estate is sufficient to pay all with a large surplus, creditors whose debts carry interest, shall be allowed interest for their respective debts from the time the computation of it was stopped by the commissioners; but such as are creditors by bond not beyond their penalties.

10. If a person indebted by bond and mortgage pays money to his creditor generally, the creditor may apply it either in discharge of the mortgage or bond. *Aliter*, if the debtor declares to which account the money shall be applied at the time of the payment.

11. Interest on an old bond cannot be allowed, in the master's office, beyond the penalty.

12. A mortgagee had also a bond, on which the interest due exceeded the penalty. The mortgagor conveyed the equity of redemption in trust for his creditors, paying this bond first, nothing beyond the penalty can be claimed.

§ 13. *Interest, general Payments, and Penalty.* B—o 605

S. C. Devise for payment of debt revives simple contract debts, even of 70 years standing, with full interest; but bond-creditors can claim nothing beyond the penalty. *Vide Ketilby v. Ketilby, cor. Bathurst, C.*

13. Where a bond and judgment entered up thereon are assigned for a valuable consideration, interest must be calculated to the date of the Master's report, and not merely to the date of the assignment; but so as not to exceed the penalty.

M. 1797, cor. Loughb. C.
Sharpe v. Earl of Scarborough,
3 Vef. jun. 537.

Sec. 14. Under what Circumstances and after what Lapse of Time a Bond-Debt is presumed to be satisfied and wholly extinguished.

1. APPELLANT brought debt against the respondent (as executor) upon a bond dated in 1670, conditioned for payment of 100*l.* Respondent brought his bill in Chancery, alledging payment, which was denied by appellant's answer, though he admitted that 107*l.* 10*s.* was paid in discharge of another bond executed by the same parties in 1671. There were three verdicts against the appellant, that the first bond was satisfied; yet he alledged that the bond in 1671 only was paid in 1679, and that the executor of one of the obligors in 1686 had paid 9*l.* for interest on the first bond. It was insisted that one bond only being satisfied, the appellant ought not to be decreed to deliver up the other bond. This cause came on at the Rolls in 1689, when his Honor directed an issue to try whether the first bond in 1670 was satisfied; upon which issue it was found satisfied. In 1691 the court directed another issue to try whether there were two bonds, and if both were satisfied. They were also found satisfied, and then a further issue was directed, whether the several bonds in question were satisfied: upon the trial of which they were likewise found satisfied; whereupon his Honor decreed the appellant to deliver up the bond of 1670; which decree on the present appeal to the Lords was affirmed.

2 Mar. 1698, Dom. Proc.
Brown v. Bradford, Executor,
Colles's P. C. 3.

2. It was contended that no demand of principal or interest on a bond for 49 years was a sufficient time to ground a presumption of payment even at law: but Lord Hardw. thought otherwise, and

H. 1710, cor. Hardw. C.
Crisby v. Middleton and al.
Prec. in Ch. 309.
2 Eq. Abr. 188. pl. 1.
3 Ch. Rep. 99.

and directed an issue to try payment or non-payment.

T. 1719, cor. Parker, C.
Hancock v. Hancock,
16 Mod. 438. 9.
2 Eq. Abr. 219. pl. 5.

3. *A.* upon his marriage entered into a bond with *B.*, that if he died without issue by his marriage, he would leave 3000*l.* to one or more of the children of his elder brother, who had married *B.*'s daughter. *A.* died without issue, having given in his lifetime and by his will more than 3000*l.* to one of these children, but without any declaration that these gifts were designed in satisfaction of his bond; because, as he said, (when advised to make such a declaration,) that it would look like complying with the bond, which had been extorted from him by the threats of *B.* In the will there was also a recital of the fraud made use of in obtaining the bond, but no other evidence of that fraud appeared. Lord Chancellor would not allow the recital in the will to overthrow the bond; but decreed, that the gifts should be taken in satisfaction of the bond, since it sufficiently appeared the obligor never intended to make those gifts over and above the satisfying the bond, which was of 50 years standing.

23 Feb. 1724, Dom. Proc.
Wekett & Ux. v. Raby,
3 Bro. P. C. 16.

4. *A.* being indebted to *B.* upon bond; and there having been a great intimacy between them, *B.*, in his last sickness, desired his executor not to trouble *A.* for this bond-debt. The executor, notwithstanding, after *B.*'s death, put the bond in suit; and on a bill filed for an injunction and relief, the court decreed the bond to be delivered up to be cancelled, and satisfaction acknowledged upon the record of the judgment: and that the executor should pay *A.* his costs both at law and in equity. But this decree was reversed by the House of Lords, as to the costs.

12 April 1731, Dom. Proc.
Richardson & Ux. v. Sedgwick
& Ux. and another,
3 Bro. P. C. 576.

5. *J. S.* being indebted to *P.* on bond, *P.*, by deed-poll, in consideration of natural love and affection for *E.* the wife of *J. S.*, agreed that this bond, and all benefit and advantage to be had thereby should, after his death, be and remain wholly and entirely for the use and benefit of *E.* and her issue, by *J. S.* *P.* afterwards thought fit to put this bond in suit; but, before the money was paid, he died. Held, that his executors were entitled to the whole debt; and that his bringing an action upon the bond was sufficient evidence of his intention,

tion, that no part of the money should remain for the benefit of *E.*

6. *A.* brought a bill against *B.* to recover divers sums on account, and also 10,000 *l.* on a stale bond of above 30 years standing. Defendant demurred as to what related to the bond; for that the plaintiff might sue at law. The demurrer being allowed, the obligee sued the bond at law, and got a verdict, after which defendant brought his bill to be relieved against the bond, as having been satisfied. The court ordered an injunction; for that there was reason to grant relief in equity, though defendant had demurred to the bill brought on the bond. Note; this cause ended by compromise, being a dispute between an aged father and his only son.

M. 1715, cor. Talbot, C.
Humphreys v. Humphreys,
3 P. Wms. 345.

Note; It is a rule that after twenty years, and no interest paid during that time, a bond shall be presumed to be satisfied unless something appears to answer the length of time, as in *Lord Barrington v. Searle*, 3 Bro. P. C. 535. where, producing a receipt for interest within twenty years, indorsed on a bond by the obligee, (though the time when such receipt was written and signed did not appear other than by the indorsement itself,) was held sufficient to take off the presumption of payment.

7. The judges have laid it down as an invariable rule, that if there be no demand for money due upon a bond for 20 years, they will direct a jury to find it satisfied, from the presumption arising from the length of time.

9 Mar. 1740, cor. Hardw. C.
Gratwick v. Simpson and another,
2 Atk. 144.
Vide 1 Stra. 652. 2 Stra. 826.
2 Raym. 1370. 8 Mod. 278.
3 P. Wms. 397.

8. It is not necessary in every case of assignments, where all the equitable interest is assigned over, to make a person who has the legal interest a party: but if an obligee has assigned over a bond, and a presumption of its being satisfied arises from the great length of time, as in the present case, where the bond was given by Sir *J. H.*'s father in 1709, and assigned over in 1717, and no demand has been made in 22 years, till the bringing of this bill by the assignee in 1739, the cause must stand over to make the representative of the obligee a party, because it is possible the obligee himself may have been paid, and therefore necessary to have an answer as to that particular, either from him or his representative.

14 Dec. 1741, cor. Hardw. C.
Brace v. Harrington,
2 Atk. 235.

9. Indorsements made by an obligee of the payment of interest on a bond are sufficient evidence to take off the presumption of time, if made and dated within 20 years; but after the expiration of 20 years, though they would be evidence of the actual payment of interest after that time, they would not be evidence to take it out of the presumption.

3 Nov. 1750, cor. Hardw. C.
Glynn v. Bank of England,
2 Ves. 43.
Vide *Searle v. Lord Barrington*,
3 Bro. P. C. 535.

See more *post*, tit. *Debts, Interest, Legacy, Time.*

Administration Bonds, see Executor and Administrator.

Annuity Bonds—Annuity.

Arbitration Bonds—Award.

Bonds given by Petitioning Creditors—Bankrupt.

Bonds in Fraud of Marriage Agreements—Marriage.

Bottomree Bonds—Trade.

Marriage-Brocage Bonds—Marriage.

Place-Brocage Bonds—Office, Place, Brocage.

Post Obiit Bonds—Fraud, Heir, Post Obiit Contracts.

Resignation Bonds—Ecclesiastical Persons and Things.

Respondentia Bonds—Trade.

Borough English.

Of Tenancy by the Custom of Borough English.

P. 1691, Canc.
Baker v Bayley, 2 Vern 226.
Vide Dowdeswell v. Dowdeswell,
 3 Keb. 475. 486. 498. cited.

H. 1703, B. R.
Clements v. Scudamore,
 1 P. Wms. 63. Salk. 243.
 6 Mod. 120.
 2 Lord Raym. 1024.

1. **A**N estate *pur autre vie* of lands in *Borough English* shall descend to the customary heir.

2. In ejectment the jury found this special verdict: *J. S.* had issue five sons, the youngest of which died in the lifetime of *J. S.*, leaving issue a daughter (the lessor of the plaintiff); after which *J. S.* purchased the lands in question, which were copyhold, and of the nature of *Borough English*, descendible, by the custom, to the youngest son and his heirs. *J. S.* died seised, and the fourth son entered; upon which the question was, whether the fourth son

son or the daughter of the fifth son should inherit these lands? After several arguments at bar, *Holt*, C. J. delivered the opinion of the whole court in favour of the daughter, *that she ought to inherit these lands jure representationis*. The youngest son, by *Borough English*, and his representatives, are as much heirs to *Borough English* lands as an eldest son or his representatives are heirs to lands descendible at common law.

All lands in *England* before the conquest were in nature of *Gavelkind**, and descendible to all the issue equally; and though the introduction of tenures and knight-service made several alterations, yet the right of representation continued.

The right of representation is not peculiar to the laws of *England*, but has prevailed by the laws of other countries, and is observed even in scripture †.

In the case of *Gavelkind* lands, if one of the sons die in the lifetime of the father, leaving a daughter, and afterwards the father die, the daughter shall have her father's share, though she be not within the words of the custom, "that the lands are part-able *inter heredes masculos*;" but the custom, by construction, will extend to daughters *jure representationis*; and there is no difference between the customs of *Gavelkind* and *Borough English*, only in respect of the quantity of land the heir takes, for in *Gavelkind* each son takes an equal part; but in *Borough English* the youngest son takes the whole; yet that does not vary the construction of the custom. The common law takes notice of these customs of *Gavelkind* and *Borough English*; and there is a very remarkable case adjudged in *Lord Bridgman's* time ‡, which is not reported in any printed book; where the case was, that the copyhold lands of every tenant dying seised, should descend to his youngest son; and a surrender was made of a copyhold to the use of J. S. and his heirs, who died before admittance: his eldest son, and not his youngest, took those lands, because of the strictness of the custom; and there never was any seisin in the ancestor: but *Lord Holt* said it would have been otherwise, had it been alledged that the lands were in the nature of *Borough English*, which it was not; but it was only set forth, a particular custom. The law regards the custom of *Borough English*, but not a special custom, which is the reason why in pleading that lands are of the nature of *Borough English*, the nature of the custom specially need not be set forth.

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Where

* *Blackborough v. Davis*,
1 P. Wms. 41.
Lambard's Saxon Laws, 36.
fo. 167. *Selden's Cadmbrus*, 184.

† *Book of Numbers*, c. 26.
ver. 33. and c. 36. *Selden de*
Successionibus apud Hebræos,
c. 23. *Hale's Hist. of the Com-*
mon Law, p. 210.
Raft Cust. 143.

‡ Anno 1660, 1661. *Intrat.*
H. 1665. rot. 779. C. B. *inter*
Hale & —, which seems to be
the same case that is cited in
2 *Kebl.* 158, 159. *nomine Pain*
v. Herbert.

Where a man is seised of *Borough English* lands, and is afterwards *disseised* and dies, the right of the lands shall descend to the youngest son; and though the son die before any entry, yet that right will go to his daughter notwithstanding the son could not be said to have *died seised* within the words of the custom.

Vide also *Reeve v. Malster*, 1 Rol. Abr. 624. pl. 1. 1 Jones, 361. Cro. Car. 410. *et vide* *Godfrey v. Bullock*, 1 Rol. Abr. 623. pl. 3. which is a full authority in point. In *Godfrey v. Bullock* the custom was, that if a man died without heir-male his eldest daughter should have his lands. The tenant had no heir-male, but had several daughters, the eldest of whom had issue a daughter, and died in the lifetime of her father. Adjudged the grand-daughter was within the custom, and should have the lands by descent upon the death of her grandfather.

Note; In the principal case Lord Holt denied Sir John Savage's case, 2 Leon. 109. 208. to be law, though he said that determination did not affect the point in question.

T. 1730, cor. King, C.
Chester v. Chester,
13 P. Wms. 63.

3. Where lands of the nature of *Borough English* are in settlement, the unsettled reversion continues as part of the old estate, and shall descend in *Borough English* as before.

11 May 1732, cor. M. R.
Pratt v. Pratt, W. Kel. 35.

4. Lands of the tenure of *Borough English* descendible to the youngest son, decreed to be brought into hotchpot, according to *stat. 22* and *23 Car. 2.* for distribution of intestate's estates.

25 Mar. 1735, cor. Talbot, C.
Lutwich v. Lutwich,
2 Eq. Abr. 448. pl. 12.
11 Vin. Abr. 191. pl. 12.
Rel. in Gavelkind, S. C. & P.

5. The following case was upon a bill brought by consent for the opinion of the court, viz. T. L. esq. having purchased an house, &c. at Turnham-Green, (which was *copyhold*, and of the custom of *Borough English*,) afterwards died intestate, leaving two sons and several daughters. The younger son brought his bill for a distributive share of his father's personal estate. Upon the hearing it was insisted for the other children, that he ought to bring this *copyhold* estate into *hotchpot*, upon the authority of the case of *Pratt and Pratt* (a) decreed by Sir Joseph Jekyll in 1732: and two questions were made upon the *stat. 22* and *23 Car. 2. cap. 10.* first, whether by the former part of *sect. 5.* in the statute, a younger son, having lands by descent, is to bring into *hotchpot*? and secondly, whether the latter part of the clause, which provides that the heir at law shall have distribution, notwithstanding lands descended, &c. regards the heir at the common law only? *Per Lord Chancellor*—As to the first point, the younger son, having lands

(a) W. Kel. 35.

Borough English.

B—o 611

lands by descent, as in this case, is not obliged to bring them into hotchpot; and the heir at law in the latter part of the clause means the heir at common law: though that point, his lordship said, was not necessary to determine, inasmuch as he thought, upon the first part of the clause, the younger son, having lands by descent, by the custom was not barred of an equal share of the personal estate with the other children. As to the case of *Pratt and Pratt*, his lordship declared he had a great regard and deference to the opinion, and the judgment thereupon given, but that however he must be guided by his own judgment and conscience.

6. Lands held in *Borough English* are not applicable in performance of a covenant in marriage articles to settle lands of inheritance on the first and other sons of the marriage, for it is not the kind of estate intended by the articles.

10 May 1751, cor. Hardw. C.
Pinnel v. Hallett, Amb. 106.
1 Eq. Abr. 26.

GENERAL REFERENCES.

B—o

Bodies Politic, see *Corporation*.

Books—Literary Property.

Boroughs, Representation of—Parliamentary Representation.

Boundaries—Copyhold, Partitions.

Brocage—Marriage—Marriage-Brocage Bonds.

Brocage Place—Place-Brocage Bonds.

Brokers—Trade.

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B—u

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Burghesses—Corporations, Parliamentary Representation.

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 74. ——— S. 6. pl. 2. third line of the case of *Wentworth v. Deverginy*, for *agreement* shall not bind read *agreement shall bind*
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 75. ——— S. 6. pl. 5. marg. for *County of Warwick* read *Countess of Warwick*
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 81. *Answer*. S. 1. pl. 1. in notes, for *Choboynd v. Lindon* read *Chetwynd v. Lindon*; and for *South-Sea Company v. Bumpsted*, 1 Eq. Ca. Abr. 76. read 78. pl. 16.
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 140. ——— pl. 42. marg. for 2 Vef. 190. read *Peacock v. Monk*, 2 Vef. 190.
 167. *Annuity*. S. 5. pl. 1. marg. for *Lord Ch. J. Hale* read *Lord Ch. J. Holt*
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 368. *Baron and Feme*. S. 8. pl. 2. marg. for 2 Vern. 408. read 2 Vern. 480.
 371. ——— pl. 8. marg. casu *Earl of Bucks v. Drury*, for *cor. Hardw. C.* read *Domo Procerum*
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